ROMAN LAW

IN THE MODERN WORLD

BY

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Uxor Alma Julia
Comes Inspirans in Roma
Tibi Consecratum

PREFACE TO THE THIRD EDITION

Because of the world-wide appreciation increasingly extended to my work, publication of another edition has finally become inevitable and should no longer be postponed.

In point of excellence it is regrettable that much modern legislation lags far behind that Roman standard which was so graphically described 14 centuries ago by the Emperor Justinian the Great, as follows: "The best laws . . . for all men . . ., laws which are direct and brief within everyone's understanding . . ., not superfluous masses of legal rules . . ., and laws obtainable at a small expense." (*Const.*, Tanta, § 12, A.D. 533.)

Progress is change, but not all change is progress. Not every change is progressive or a step forward; a change may be in reality retrogressive or a step backward. This universal truth is applicable also to law and jurisprudence. Modern legislation not in line or harmonious with that centuries-old progressive world-current of law and jurisprudence, which emanated originally from Rome, can at most be only ephemeral or transient, leaving behind no permanent influence in the world of to-day.

C. P. S.

July 19, 1937

PREFACE TO THE SECOND EDITION

The first edition of my work was published three years after the World War began in Europe. The outcome of that great War, which reshaped much of the map of Europe, has made necessary the preparation of a second edition of my work, especially that portion which treats of Codes and Codification of Modern Law, particularly the present day jurisprudence of Europe.

It is hoped that the international favor with which my first edition was received will be extended also to this new edition. Quite gratifying has been the widespread scholarly recognition of the fundamental design of my work, which was intended to meet two very substantial wants: as to Roman Law, my combined treatment of history, text, and bibliography should make the work a complete vade-mecum, a veritable encyclopedia, and, therefore, perhaps the best work in English on the subject; as to the Modern Foreign Codes, my detailed ensemble treatment of these codes and codification is probably the only work of the kind at the present time for students of Modern Comparative Law.

Still effective for progress in Modern Jurisprudence is the world-mission of Roman Law since Justinian; witness the evident Romanization also of very much of the present Brazilian Law as exhibited in that most modern of codes the 1917 Civil Code of Brazil. *Ave Roma immortalis, — aeternum jus Romanum!*

C. P. S.

New Haven, Conn.,
Sept. 29, 1922.

PREFACE TO FIRST EDITION

The revival in the United States of the study of the Civil Law has already assumed ample proportions which are yearly increasing, and its full fruition with many far-reaching consequences is but a question of time. The greatest contribution of this revival to American law will be a powerful influence operating for the betterment of the private law of the United States, purging it of its present dross of redundancy, prolixity, inconsistency, and lack of uniformity, and crystallizing it into the compact form of a codification.

The following work is dedicated to the continuing success of this movement so fraught with benefit to the progress of American jurisprudence. It is designed to meet the requirements, both similar and dissimilar, of various classes of readers: the general reader, the non-professional student, the law student, and the law teacher. For the law and administration of Rome are to-day a living force constantly employed by the jurist, the publicist, the historian, and the theologian, as well as by others for constructing their theories or demolishing those of their opponents.

The first volume of my work is a historical introduction to the development of modern law, beginning with the genesis of Roman law as a local city law, describing its evolution into a body of legal principles fit to regulate the world, portraying its establishment as a world law, and ending with an account of the universal descent or reception of the Civil Law into modern law.

The second volume contains the principles of the Civil Law, more especially private law, arranged systematically in the order of a code, and illustrated, as to their survival, from Anglo-American law and the Modern Codes as copiously as space will permit. For almost all the Roman law of Justinian's era is still living to-day in the modern world.

The third volume contains Roman and modern guides to the subjects of the entire book, an exhaustive general bibliography of Roman law, and the index.

For the convenience of law students and teachers the text of the volumes is divided into sections. For the same reason the volumes are indexed according to sections. Exponent figures are employed to indicate the edition cited of any book which has passed through several editions: for instance Girard, *Manuel de droit romain*[5], means the fifth edition of 1911.

C.P.S.

YALE UNIVERSITY,
JUNE 1, 1916.

LIST OF PRINCIPAL ABBREVIATIONS USED IN ROMAN LAW TREATISES

B.; Bas. = Basilica of Leo VI.

C.; Cod.; Code = Code of Justinian. (Code, 8, 10, 6 is 8th book, 10th title, 6th law or constitution.)

C. Th.; Cod. Theod. = Code of Theodosius. (It is cited like the Code of Justinian.)

Collatio = Mosaicarum et Romanarum legum collatio.

Const. = Constitution, sometimes referring also to a prefatory constitution of the Code or Digest, e.g. Const. "Omnem."

D.; Dig.; Digest; P. = Digest or Pandects of Justinian (Dig. 17, 1, 25 pr. is 17th book, 1st title, 25th fragment, principium or first paragraph.)

Frag. Vat. = Vatican Fragments.

G.; Gaius = Institutes of Gaius. (Gaius, 2, 1 is 2d book, 1st section.)

I.; Inst.; J. = Institutes of Justinian. (Inst. 2, 6, 10 is 2d book, 6th title, 10th section.)

l. = Constitution, law, or fragment.

L. = Book. (Unless it is the numeral "50.")

N.; Nov.; Novel = Novels of Justinian. (Nov. 18, 3 is 18th novel, 3d chapter.)

Paul. Sent.; Sent. P. = Sententiae of Julius Paulus.

Pr.; pr. = Principium, the first paragraph and preliminary section of the Institutes, or of a fragment of a title of the Digest, or of a constitution or law of the Code.

SC. = Senatusconsultum or decree of the Senate.

Theophilus; Theoph. Inst. = Paraphrase of the Institutes of Justinian by Theophilus.

Ulpian Reg.; Reg. = Regulae of Domitius Ulpian.

XII Tab.; XII Tables = Law of the XII Tables.

§ = Section.

The latest modern Civilians or Romanists, including the author, cite the Corpus Juris Civilis from the stereotyped edition of Krueger, Mommsen, Schoell, and Kroll; and the Code of Theodosius, from Mommsen's edition.

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INTRODUCTION

INTRODUCTION

CHAPTER I

THE VALUE OF ROMAN LAW TO THE AMERICAN LAWYER OF TO-DAY[1]

Roman law still lives in the modern world. In spite of the recent progress of American legal education there still lingers in some places that now time-worn belief that a knowledge of Roman law is of no use at all in the legal profession. §1

This view of the present value of Roman law is obviously superficial. It is based on the assumption that, because the Roman State and tribunals perished centuries ago, therefore Roman law itself also has long been dead. Now this conception of the fate of Roman law is historically inaccurate and false. The spirit of Roman law did not die, — on the contrary it is still very much alive in our midst. Moreover it was the majestic and beneficent Roman law which more than any other single element brought civilization back to Europe following the barbaric deluge of the Dark Ages.[2] From Rome we have inherited our conceptions of law, the State, and the family.[3] The high, firm, secure legal position of woman in European and American civilization, which makes our civilization superior to all other types, is a legacy from the Roman law. The Civil Law was the first to work out and recognize the equality of woman with man.[4]

The inability of the superficial observer to discern the living Roman law of to-day is on account of its modern dress:

[1] A part of this was published by the author in 60 Penn. Law Review and Am. Law Reg , p. 194, Dec. 1911, under the title of *The value of Roman law to the American lawyer of to-day*, and is reprinted by permission.

[2] See Taylor, *The mediæval mind*, London, 1911.

[3] See Chamberlain, *The foundations of the nineteenth century*, London, 1911, whose work has already gone through eight editions.

[4] *Id.*

in place of its original Latin garb, Roman law is now clothed in a twentieth century garment of various patterns such as the Roman-German law, the Roman-French law and the Roman-English law. The past and present in law are inextricably woven together.

§ 2 **Advantages obtainable from the study of the Civil Law.** But it may be argued that, admitting the survival of Roman law into all modern legal systems, what actual, concrete, present or future professional advantages can now be derived from the study of Roman law? This is the answer: that Roman law should be studied fervently with a view to the betterment of our American law, which sadly needs improvement and which in so many respects — particularly by its lack of codification — is greatly inferior to other modern legal systems. Our system of precedents and case reports is breaking down from its own weight and is becoming decadent[5]: how soon will codification take its place? We must study Roman law with this aim in view, as have the French and Germans, if we wish our law to attain foremost rank — its proper station — in the modern world.

Perhaps the most alarming portent of the twentieth century in the United States is the general unpopularity and growing disrepute into which law and the administration of justice are falling.[6] All this must be remedied or grave national peril will slowly but surely follow. The remedy for professional incompetency is to destroy the evil at its very source — before admission to the Bar — by requiring, as is already inaugurated in America, a higher standard of character and legal education. The profession of the law needs better men with a wider professional horizon. Moral perceptions and the sense of justice must be cultivated while the intellect is being trained.

There is one study which combines ethical and intellectual advantages, — Roman law It is largely because of the past non-attention to Roman law in America that the progress of

[5] See Sheppard, *The decadence of the system of precedent*, 24 Harvard Law Review, pp 295–305

[6] See Coudert, *The crisis of the law and professional incompetency*, 3 American Law School Review, p. 31 (1911).

our law has been so difficult and at times almost stationary: the Roman conception that law should be synonymous with justice[7] has been too often overlooked. When the study of Roman law shall be a prerequisite for admission to the Bar, as in Great Britain and other European countries, the advancement of our law will be so perceptibly stimulated that the fires of American popular discontent with the law will burn low and soon die out.

Ethical value of Roman law. Of inestimable advantage is the ethical benefit derivable from Roman law study. To conceive of the value of knowledge as based upon its utility for the acquisition of wealth or material success is to completely overlook the chief purpose in all education, — namely the development of character as well as intellect. Twenty-three centuries ago Plato laid the greatest emphasis on the adapting of the curriculum in the most perfect manner for the promotion of virtue.[8] This truth our own Milton restated nearly 300 years ago in defining education as "that which fits a man to perform justly all the offices, both public and private, of peace and war."[9] How pertinent all this is when we turn to legal education! The ideal lawyer is not one who has obtained the best legal equipment for the practice of his profession, if that professional training has not developed his character along the lines of what is just and right. §3

What the world needs to-day is not more law, but more justice. The great danger to our profession is that its ideals are in peril of becoming commercialized. In other words, the practice of law is in danger of becoming a mere trade and of losing its professional nobility, thus accurately described by the Roman jurist Ulpian: "When a man means to give his attention to law he ought first to know whence the term 'law' is derived. Now law [*jus*] is so called from justice: in fact . . . it is the art of what is good and fair. Of this art we may deservedly be called the priests; we cherish justice and profess the knowledge of what is good and fair, we separate

[7] See *Digest* 1, 1, 1, pr. and 1: *jus* (law) is so-called from *justitia* (justice).

[8] See *Republic*, book ii.

[9] *Tractate on education.*

what is fair from what is unfair, we discriminate between what is allowed and what is forbidden, we desire to make men good, not only by putting them in fear of penalties, but also by appealing to them through rewards, proceeding, if I am not mistaken, on a real and not a pretended philosophy."[10]

The Roman jurists breathed deeply the pure air of ethics; they taught the never-to-be-forgotten truth that law and ethics are very closely related. An acquaintance with the loftiest system of jurisprudence the world has ever seen cannot fail to give first of all an enormous uplift to character.

§4 **Intellectual value of Roman law.** The intellectual value of Roman law study is incalculable, because it is many-sided. The most salient advantages of a Roman law knowledge are these three: the practical benefit, the philosophical benefit, the strictly professional benefit.

§5 1. **The practical benefit.** There is a very practical side of the intellectual value of Roman law: the study of Roman law greatly assists the acquisition of a correct style of legal expression. Does not the possession of a correct style help a lawyer? The style of the Roman jurists is simple, clear, brief, terse, nervous and precise. In the matter of legal expression Roman jurisprudence is far superior to the Anglo-American, and is worthy of imitation in this respect. It should never be forgotten that "Law," as Sir Henry Maine says,[11] "is the chief branch of Latin literature; it was the only literature of the Romans which has any claim to originality; it was the only part of their literature in which the Romans themselves took any strong interest and it is the one part which has profoundly influenced modern thought."

§6 2. **The philosophical benefit.** There is also a far-reaching philosophical aspect of the intellectual value of Roman law The study of Roman law inevitably produces an ever-widening realization that Roman law is of enormous historical value to modern nations. It is at hand, ready for use and able to shed copious light on the solution of the numerous complex problems which confront the modern civilized world. How vast is

[10] *Digest* 1, 1, 1 pr and 1 (Monro)

[11] *Early history of institutions*, p. 308.

the scope of this aspect will be briefly indicated. In his *Valedictory* Roman law lecture at Oxford Professor James Bryce[12] most lucidly observed that "the Roman law is indeed world-wide for it represents the whilom unity of civilized mankind. There is not a problem of jurisprudence which it does not touch: there is scarcely a corner of political science on which its light has not fallen."[13] With this great truth should be carried the fact that the Roman social system more nearly resembled our own of to-day than ours does that of England two hundred years ago. Notice some of the resemblances of Rome to us: at Rome the free man constituted the State; there were no distinctions of rank except such as tenure of office temporarily gives: ownership of land was allodial or absolute; land was freely transferrable; intercourse between the Roman provinces was easy and frequent; and the face of the Roman empire was dotted with rich and populous towns and cities.[14] (§6)

Roman life and the fall of Rome are and have been an object of comparative study to the modern world. Authors, teachers, preachers, lawyers, and even rulers constantly draw upon Rome to substantiate a position taken as to some doctrine or theory of an economic, political, social, legal, or moral nature: the evidence of this is enormous and shows no diminution of bulk or interest. For instance Professor Petrie, in attacking trade-unionism, declares and offers much evidence to prove that it, and not slavery and vice, wrecked the Roman empire, and will wreck the modern world if it is not careful.[15] Another comparison is synthetically striking: "Rome, again, can teach us that the elimination of militarism and of national rivalries is not all unmixed good; that socialism in many of its forms has actually been tried, and that it drained the State of industry, energy and vitality; that it is dangerous and in the end disastrous, to encourage the unfit at the expense of the fit and thrifty; that it is a very false economy to pillage

[12] Later Lord Bryce, formerly British Ambassador to the United States. Viscount Bryce is the most famous of modern English Civilians.

[13] *Studies*, p. 898

[14] See Morris, *History of the development of law*, p. 186.

[15] See *Janus in modern life*, 1907.

(§ 6) the rich in the supposed interests of the poor; and that finally a bureaucracy is the worst of human plagues; . . . and that the tax-gatherer was more destructive to the Roman empire than all the barbarians together . . . At any rate these causes destroyed a magnificent and beneficent civilization, and plunged the West of Europe into darkness for a long 1000 years. Who will venture to say that many of these causes are not operating among ourselves to-day, and tending in very ominous directions?"[16] If our civilization is disregardful of the ideals, warnings, and lessons given us from past civilizations, and especially that of Rome, it can never expect to reach a very high plane.[17]

If philosophical comparison between the Roman and the modern world be now turned specifically to jurisprudence, what a grand opportunity to liberalize our preconceived ideas of justice is afforded by instituting a comparison of Roman and American law! It is a great privilege which we have of placing Roman and our law side by side for parallel comparison in order to cultivate the philosophical spirit of inquiry. This results in stamping upon the memory that law is the subject of a science. For instance, it is truly scientific to study the centralizing movements of the Roman law in order to throw light upon the question of how to behave with regard to the tendency in the United States to centralize the constitutional power of the Federal Union.[18]

Moreover there is a most useful field for comparative study of Roman and American law along this line, — to observe the effect upon each jurisprudence of the different conditions of society under which the Roman and English systems developed. For Roman law was the product of a highly civilized people secured for centuries in the enjoyment of peace within their borders; while the English Common Law is the product of a people emerging from barbaric conditions of society, fond of strife, — it is non-philosophical and ethically harsh, the very opposite of Roman law.

[16] *The Spectator*, p. 450, London, Sept. 25, 1909.

[17] See *Address* of Prof. Tracy Peck, 20 Yale Alumni Weekly, p. 989.

[18] Leonhardt, *American remembrances of a German teacher of Roman law*, 18 Yale Law Journal, p. 584.

Again, in dealing with rules of private law, if the American and Roman rules as to a doctrine of law differ, the student is led to ask why. This gives him a better view of the origin and range of the American rule by perceiving wherein it varies from the Roman, or perhaps the Roman rule will seem the more just. By such methods as these we approach a *complete comprehension of the true nature of private law.* We cannot fail to observe as we proceed in our comparative study that the Romans were the first "to perfect a completed system of private law,"[19] a jurisprudence which has best approximated the conception of what private law would be if the legislator were perfectly wise.

§7 **3. The strictly professional benefit.** There is also a strictly professional side of the intellectual value of Roman law. It is concerned with the influence of Roman law on American law. This is a wonderfully fascinating aspect. It is beyond all others of vital interest to American lawyers. The study of Roman law soon awakens and then continually quickens this great perception: that the present development of American law into a jurisprudence is almost entirely due to its assimilation of Roman jurisprudence, and that what American law needs most to-day is more of the invigorating eternal influence of Roman law. This strictly professional point of view covers the entire history, past and present, of Anglo-American law. It embraces most extensive and varied details. And it will reveal that the goal of Roman law influence on American law has not yet been reached. For a twentieth century lawyer who wishes to reach the front rank of his profession an acquaintance with the Civil Law forms to-day a highly important element of his necessary legal equipment, and will have to be obtained either before or after admission to the Bar.

Yale was the first American law school to recognize the professional value of Roman law to the American lawyer. For many years Yale was as a light shining in gross darkness. But the blackness of ignorance and prejudice is now being rapidly dispelled. The leading American law schools, such as Harvard, Columbia, Chicago, Pennsylvania, Stanford, and

[19] See Lefroy, *Private law, etc.*, 20 Harvard Law Review, p. 606.

(§7) numerous minor schools and colleges are now giving instruction in Roman law. Moreover this Roman law movement has proceeded still further. Already in some American states, as in England, a knowledge of Roman law is required for admission to the Bar.[20]

Ignorance and prejudice — so potent in past centuries in England and America — no longer obscure the great debt of Anglo-American law to the law of Rome and the truth that knowledge of Roman law is knowledge of our own law. It is a fact that the beginner in the law will make almost as rapid progress in American law by starting with Roman as he would if he began with our own law: for, in learning Roman law, one learns the elements of law in general and therefore of Anglo-American law in particular.[21] The *Institutes of Justinian* are to be best explained as a *common source* of the fundamental ideas of Anglo-American as well as Continental European jurisprudence. "It must be owned," said Lord Chief Justice Holt, "that the principles of our law are borrowed from the Civil Law and therefore grounded on the same reason in many things."[22]

England and the United States, although not so completely as the countries of Continental Europe and Latin America, are to-day under the dominion of Roman jurisprudence. Anglo-American law, like French or German, is Roman law of the twentieth century.

A cursory study of Roman law reveals the great debt of our law to it. The American law of Admiralty, of Wills and Probate, can show a direct descent from the imperial jurisprudence of Rome. From the Civil Law Lord Mansfield introduced into English Common Law much of our Law Merchant or Mercantile Law. The basic principles of Equity are of Civil Law origin. The fundamental doctrines of the law of Persons (including Corporations) and of our law of Property

[20] Louisiana and Kansas. Some Roman law instruction is necessary properly to apprehend the law of California, Texas, Porto Rico, and the Philippines. See *Rules for admission to the Bar*, pp. 56, 62, 18, 160, 140, 143 (West Pub. Co., 1913).

[21] Bryce, *Studies*, pp. 895, 896.

[22] 12 Modern Reports, 482; Bryce, *Studies*, p. 871.

(especially Obligations, Contracts, and Successions) came from Roman law. The basis of Anglo-American law — if not its predominant element — is the Civil Law of Rome. (§7)

More than this. As a country we are now repeating the activity of Rome in legislation. The development of our American law into jurisprudence has been, especially during the last century and a half, most usually by a return to the Civil Law of Rome. And this returning is still in progress. The most striking illustrations — and there are many — are these three. (1) The feudal Common Law ideal that husband and wife are one and that one is the husband, has been repudiated in nearly all American states. Married women now have restored to them the power to control their separate property independently of their husbands. And this is simply the re-enactment of the doctrine of Roman law as to the freedom of married women. (2) Every American state has laws of inheritance similar to those of Rome. (3) The most pressing terrible necessity of our times is how to frame out of the gigantic mass of our reported case law an organized body of rules, — in other words how to codify our law. All civilized countries of the world except Great Britain and the United States have followed the example of Rome and codified their law. France, Germany, Spain, Italy, Austria, the Latin-American States, and Japan have adopted the Roman Emperor Justinian's solution of this problem. Our lawyers are being driven — whether they like it or not — to examine the means and results of codification. In the future — the immediate future — those in the legal profession who can do this work will reap its rewards.

Finally, no one can intelligently practise law in Louisiana, Texas, New Mexico, Arizona, California, or competently investigate the law of Porto Rico, the Philippines, the Canadian province of Quebec, and all the Latin-American republics without a knowledge of Roman law, out of which was carved the French or Spanish law which is the basis of the law of these states, territories, and countries.

The strictly professional value of Roman law to the American practitioner at the Bar looms larger as our investigation continues. A knowledge of Roman law is now bringing from

(§7) foreign sources professional advantages which are constantly increasing. Speedy and frequent communication is making the world rapidly smaller. Business long ago ceased to be confined by national boundary lines. Law business of an international character is continually increasing in our large cities, especially those along the Atlantic seaboard. Not only does Roman law throw light upon many of the doctrines of international law,[23] but it is the key which unlocks the legal systems of modern Continental Europe as embodied in their Modern Codes. These codes have been imitated in Latin-America, Asia, and Africa. The professional benefit arising from a familiarity with the Modern Codes is self-evident.

The field of professional usefulness open to the twentieth century American Civilian is now extensive. Its limits are constantly expanding. An abundant harvest of increasing opportunities of power as a legislator and of international leadership at the bar awaits the American lawyer possessed of a Roman law knowledge.

[23] See Phillipson, *The international law and custom of ancient Greece and Rome*, London, 1911.

CHAPTER II

THE VALUE OF LEGAL HISTORY

§8 **Law a science governed by evolution.** The maxim of the philosophers *Ex nihilo nihil fit*—'something does not come from nothing'—may be taken as the keynote to all legal history. To know how the development of law occurred not only imparts a realization of the incalculable benefits given to the world by lawyers throughout the ages, but also stamps upon the mind an indelible impression that law is a science developed by evolution. Maitland, the most brilliant of English legal historians and whose works are an imperishable monument of the nineteenth century, thus truly emphasizes the value of legal history: "Strenuous endeavors to improve the law are not impeded but forwarded by a zealous study of legal history. . . . To-day we study the day before yesterday, in order that yesterday may not paralyze to-day, and that to-day may not paralyze to-morrow."[1]

'The memory of mankind' as to law reveals the fact that subsequent nations are large debtors to earlier peoples for their law and jurisprudence. The quantum of legal knowledge is never lost; it descends from age to age; from people to people; it has periods of marked growth and progress; it also has periods of obscurity, followed usually by re-emergence, recovery, and further progress.

The history of modern law is but an offshoot of the history of ancient law. The line of demarcation is not easily discernible and may be invisible. "Ancient" and "modern" are at best but relative terms: that which seems to be "modern" may be found to be quite "ancient." Not only do all modern nations enjoy to a greater or less extent a heritage of Roman law, but Rome herself was debtor to Greece for legal principles. And Greece in turn probably borrowed from Babylon via Egypt.

[1] *Collected papers*, "A survey of a century," vol. iii, pp. 438–9.

§9 **Scope of our investigation.** The scope of our investigation is intended to cover two fields of legal history: the development of Roman law, and the survival or reception of Roman law in modern law. In reality these two fields, owing to their adjacent situation, are but one territory: the history of modern law is the last and widest phase of the history of Roman law. Our investigation is intended to constitute a historical introduction to the history of law from Roman to modern times. An exhaustive treatment of all the multitudinous details which a complete history of law involves is impossible on account of lack of space. Our investigation will necessarily lead to an acquaintance with the legal literature of Rome and all modern countries.

§10 1. **The development of Roman law.** A brief consideration of the ante-Roman sources of law will preface our investigation of the development of Roman law proper. This will be followed by an account of the origin of Roman law as the local law of a city, its gradual growth to a complete system of jurisprudence, and its establishment as the law of the world. The causes of this evolution will be ascertained. The work of the Roman Emperors in transforming the chaos of Roman law into order and certainty will be examined.

Special attention will be paid to the work of the Roman jurists, the influence of Greek culture and philosophy on Roman law, and how Christianity affected Roman law. Moreover that vexed modern question of the right method of law study will be investigated from Roman sources. The Roman answer will be found to solve all our difficulties; it has lost none of its virtue by lapse of time.

The inevitable outcome of all this will be a profounder realization of this fact: that "the genius of the most legal-minded people the world ever has known developed step-by-step out of the archaic customs of a petty tribal town until the whole of the civilized world prospered under the lofty principles of justice and right worked out by the great lawyers of the Republic and the Empire."[2]

§11 2. **The survival or reception of Roman law in modern law.** A historical account of the universal descent or reception of

[2] *Commemorative addresses A. S. Wheeler*, 1905 (E. V. Raynolds), p. 21.

Roman law into all modern systems of law will conclude our (§ 11)
investigation. "Rome," says Ihering, "conquered the world three times: first by her armies, second by her religion, third by her law. This third conquest, most pacific of all, is perhaps the most surpassing of all."[3] A work of judicial conquest has already been completed, the magnitude of which is most amazing. The modern domains of Roman law extend far beyond the vast empire of the Caesars. The entire continent of Europe, the entire New World with its twin Americas, and an ever increasing portion of Asia and Africa constitute the provinces of the vast modern realm of Roman law. In its palmiest days the population of the Roman Empire numbered about 54,000,000[4]; to-day over 870,000,000[5] people, or sixteen times the population of the Roman Empire, are living under law very largely traceable to Roman law. All civilized and even many semi-civilized peoples of modern times bear witness to this universal survival or reception of Roman law. We shall investigate the facts of this survival as found in English, French, German, Spanish, Latin-American, Italian, Russian, Swiss, Scandinavian, Japanese, Roman-Dutch, and other systems of law.

Of the whole earth nothing now remains unconquered by the powers which may be called the offspring of the Roman Empire, but Abyssinia, Japan, Turkey, and China. In Abyssinia much of Christianity and Roman law still remains to-day; Japan has obtained from Western civilization among other things her codes of law largely Roman in essence; and even degenerate Turkey has been indirectly influenced by Roman law both as surviving in Mohammedan law and received in her modern codes modeled on the Codes Napoleon. Consequently these three Oriental countries are after all not wholly without the pale of Roman jurisprudence. All the countries of the world save China, and eventually China will be included,

[3] See Brissaud, *Cours d'hist. gen. du droit français*, vol. i, pp. 192–3.

[4] Brodie's estimate of the Roman Empire A.D. 14. See Harper's *Book of facts*, "population."

[5] *World almanac 1916*, pp. 450, 451. This estimate includes the inhabitants of Europe, both Americas, India, Egypt, Australia, New Zealand, South Africa, Japan. It is much larger for the year 1937.

have now come under the rule of the Roman laws framed in the Eternal City and codified by Justinian. All this reveals the eternal character of Roman law, which, firmly retaining the world it has conquered, changes merely its dress with the passing centuries. "The conquest of the world by the Roman Empire has passed away, but the conquest of the world by Roman law has not passed away and there is no sign that it will pass away so long as mankind endures. It rules to-day a wider empire than the Caesars ever knew, and its empire is ever widening."[6]

§12 **The world-mission of Roman law since Justinian.** Gibbon's most wonderful *History of the decline and fall of the Roman Empire* bears a misnomer in the title: it should be entitled "The history of European civilization."[7] But to use the expression "History of Roman law since Justinian" to describe the survival of Roman law in modern law is quite accurate, for it is but another expression for "The history of modern law." Roman law survived the deluge of the barbarian invasions, which overwhelmed the Roman Empire; it furnished the light of progress in the darkness of the Medieval Ages; and it was revived and received with fervor and was studied as never before, — the effects of this revival have not yet passed away in the modern world. Roman law since Justinian has had and still possesses a special world mission of its own, which, as the legal history of modern countries reveals, is either accomplished or in process of being fullfilled. This world-mission will be seen to have been effectual along many lines of human activity — all making for progress in medieval and modern law. Some of these are of profoundest importance, others are of a minor value.

The **minor features** of the world-mission of Roman law since Justinian are numerous. The oldest things in modern Occidental civilization are Roman law and the Christian Church. It was Roman law which to a very large extent caused the Revival of Learning and the Renaissance, — that great movement which marks the beginnings of modern times. The oldest educational institution in the modern

[6] *Commemorative addresses A. S. Wheeler*, 1905 (E. V. Raynolds) p. 21.

[7] A favorite expression of the late Prof. A. S. Wheeler of Yale University.

world is the law school. To study law — Roman law — was ordinarily the chief purpose for which medieval universities were founded. The first European university — Bologna — began with a law school, to which other faculties were subsequently added.[8] And wherever Roman law was revived universities with law schools sprang up, as we shall see. Another minor feature of the world-mission of Roman law since Justinian is the long roll of medieval and modern jurists, to whom by reason of their Roman law knowledge are due creations or betterments of the law of their age. These are the men who actually did the work of recovering Roman law for posterity's benefit. And our investigation would not be complete without some mention of this galaxy of most illustrious Romanists and their special labors.

But it is the following major features of the world-mission of Roman law since Justinian which should be emphasized because these have directly caused enormous contributions to the progress of modern law.

§ 13 1. **To mold the private law of every modern State.** This explains why the Roman element is the predominating element in all modern law.

§ 14 2. **To cause uniformity of law in every modern State, — one law for an entire country.** This is a strikingly large feature of the modern influence of Roman law. Some countries, such as France, Germany, and Italy, have fully realized this ideal; others, like Great Britain and the United States, are still a long way from this realization. Not only has the modern influence of Roman law caused uniformity of law within a country, but to-day it is also operating to cause the laws of different countries to become uniform and cease to be diverse. It was Austin who first made so plain that there is in the modern world a universal jurisprudence, to which all systems of law including the English must tacitly conform. This is but another side of the world influence of Roman law. The progress of the world is toward uniformity of law.[9] Each modern country, as did Rome herself, has developed its law under the stress not only of internal politics, but by

[8] See Colquhoun, *Roman civil law*, § 136.

[9] Bryce, *Studies*, p. 123.

(§ 14) reason of the external influence exerted upon it from other countries.[10] For instance, the catholicity of jurisprudence administered in the two greatest courts of the world cannot fail to have eventually a reflex effect of paving the way for universal uniform laws.

The world's greatest court is the British Privy Council Judicial Committee, which possesses jurisdiction over nearly 400,000,000 people.[11] In its modest Downing Street home, close to the London residence of the Prime Minister, the Privy Council frequently deals with questions of French law which prevails in Canada, Mauritius and Seychelles, questions of Roman-Dutch law which is the common law of Ceylon, South Africa, and Guiana, and questions of Mohammedan law which is found in India and into which to some extent Roman law has filtered. By reason of this varied jurisdiction the Justinian Corpus Juris, the Code Napoleon, Grotius' Jurisprudence, or Pothier's Commentaries may be appropriately cited as authorities before this majestic imperial British tribunal.[12]

The next largest court in the world is the Supreme Court of the United States with a jurisdiction over nearly 110,000,000 people.[13] In addition to entertaining cases in American law, this august court may hear cases involving French law which is found in Louisiana, and Spanish law which is the common law of Porto Rico and the Philippines and partly survives in several of our southwestern American states.

The modern world has learned to think 'world-wise' largely because of the modern influence of Roman law. As Ferrero rightly says: "Rome is still in the mental field the strongest bond that holds together the most diverse peoples . . . ; it unites the French, the English, the Germans in an ideal entity which overcomes in part the diversity in speech, in traditions, in geographical situation

[10] *Id.*

[11] *World almanac 1916*, p. 451.

[12] The Judicial Committee of the Privy Council hears not only Colonial appeals but also appeals from the *ecclesiastical* courts of England. But all other English appeals, all Irish and Scotch appeals go to the House of Lords, which is the supreme appellate tribunal for Great Britain.

[13] *Id.* p. 450. The 1937 total is more than 120,000,000. But in 1935 the Philippines became virtually independent.

and in history."[14] To Rome's influence in the modern world is due in no small measure the acknowledged fact that Europe and America are to-day "for intellectual and spiritual purposes one great federation," as Matthew Arnold said.

§ 15 **3. To embody the uniform law of every modern country in a codification.** To bring about a system of codified law in modern countries is perhaps the crowning feature of the modern influence of Roman law. How effective this has been is seen at a glance, when attention is directed to the fact that nearly all modern civilized States to-day possess a codified law. The way to accomplish a codification suitable to our age was first blazed by the French Codes Napoleon only a little more than a century ago, — in 1804. And in this pathway have since followed nearly all the modern civilized nations. Even the two great exceptions among nations — *Great Britain and the United States* — are slowly yielding to this universal trend toward codification, as will subsequently be shown.

The leaven of Roman law influence is seen at work in modern American law, in that lucid description of a codification made by David Dudley Field: "To reduce the bulk, clear out the refuse, condense and arrange the residuum, so that the people and the lawyer, and the judge as well, may know what they have to practise and obey — this is codification, nothing more and nothing less."[15] To lose this priceless classical heritage in law and politics out of our civilization would be the commencement of a reversion to barbarism.

[14] *Characters and events in Roman history*, p. 257.

[15] Legal Bibliog., n. s. 10, p. 11 (June 1912).

CHAPTER III

ANTE-ROMAN SOURCES OF LAW

§ 16 **Babylon probably the real mother of law.** The question of the origin of Roman law is now not easily answerable. But one thing is quite certain: other nations of an earlier date than Rome had a law of established and well developed principles long before Roman history commences. The ultimate beginnings of law are undoubtedly ante-Roman and non-Roman.

One of the greatest German Romanists of our era — the renowned Ihering — was thoroughly convinced that if we would search out the origins of Roman law we must study Babylon.[1] This is also the view of two other eminent modern Civilians, the French Revillout[2] and the American Morris.[3] And even a cursory examination of the recently discovered Code of Hammurabi[4] reveals that over 4000 years ago Babylon or Chaldaea had a complete system of law and courts.[5] Agency, bailment, banking, carriers, pledge, warehousemen, and navigation were topics familiar to Babylonian law.

§ 17 **Influence of Babylonian law on Egyptian law. A well developed Egyptian law antedates Greek law.** It is now beyond dispute that never yet has civilization evolved from barbarism without external assistance. That Chaldaean

[1] *Vorgeschichte der Indo-Europäer* (1894); Maitland, *Prologue to a history of English law*, 14 Law Quart. Rev., pp. 13–33; *Essays on Anglo-American law*, vol. i, p. 7.

[2] *Les origines égyptiennes du droit civil romain* (particularly p. vi), Paris, 1912.

[3] *History of the development of law*, pp. 11–86, Washington, 1909. Judge Morris lays emphasis on Israelitic as well as Babylonian law as an early non-Roman source of law, although the second is the more ancient source.

[4] Found in 1902 at Susa, the old Babylonian capital. It is now on exhibition at the Louvre, Paris.

[5] See Harper's English translation of *The Code of Hammurabi, King of Babylon*, about 2250 B. C., Chicago, 1904.

civilization was largely influential in originating and shaping Egyptian civilization is historically correct. That Egyptian civilization in turn exercised a potent influence upon Greece is well known. That Greek civilization served in many respects as a model for the later Roman civilization is equally true.

The influence of Babylonian law traveled beyond the borders of Babylon: eastward into the law of Hindustan and especially the famous Code of Manu[6]; westward into Egyptian,[7] Phoenician, and Judaean law. In course of time Egypt developed an elaborate system of private law the details of which were carefully worked out.[8] The Egyptian law of persons,[9] property,[10] obligations,[11] and actions,[12] is scientifically constructed and excellent in character. Egyptian law has contributed much to the philosophy of law.[13] The Greek historian Diodorus[14] mentions five Egyptian monarchs as great legislators: Menes, Sasychis, Sesostris, Boccharis, (called the Wise), and Amasis.[15] The last two belong to the period of the late monarchy. The view that much of Babylonian law descended into Rome[16] via Egypt and Greece must not be treated lightly or with disdain.

Influence of Egyptian and Phoenician law on Greek law. § 18 Archaeological research in Greece since 1870 has revealed to us the very early Minoan and Mycenaean ages of Greek

[6] Written between 200 B.C. and A.D. 200. See Morris, *History of the development of law*, p. 75 et seq.

[7] See Revillout, *Précis du droit égyptien*, vol. i, p. xviii, note (1).

[8] Revillout, *Précis du droit égyptien*, 2 vols., Paris, 1903, see also pertinent note (1), p. xviii; also his *Origines égyptiennes du droit civil romain*, especially pp. 97–149.

[9] *Id.*, vol. ii, part 2, pp. 881–1151.

[10] *Id.*, vol. i, part 1, pp. 1–776; vol. ii, pp. 777–880.

[11] *Id.*, vol. ii, part 4, pp. 1150–1355.

[12] *Id.*, vol. i, part 5, pp. 1356–1508.

[13] *Id.*, vol. ii, part 6, pp. 1509–61.

[14] Diodorus Siculus, a contemporary of Julius and Augustus Caesar, was born in Sicily. He traveled in Egypt 60–57 B.C.

[15] All these and their legislation are discussed by Revillout in his *Précis du droit égyptien.*

[16] See Revillout, *Précis du droit égyptien*, vol. i, p. xviii, note (1), also pp. xix-xxi. The text of his two volumes contains very frequent comparisons of Roman and Egyptian law.

civilization and has pushed back the starting point of Greek history to 3000–4000 B.C. Schliemann's excavations at Troy,[17] at Mycenae,[18] and Tiryns in Argolis,[19] and those of Evans in the island of Crete[20] confirm the ancient traditions that Greece was debtor to Egypt and Phoenicia for many of her earliest principles of art, religion, and law.[21] Such was the inevitable outcome of the active commerce of these maritime civilized countries with early Greece.[22] From Phoenicia came those ancient Greek rulers, the semi-legendary Minos of Crete and Cadmus of Thebes and Illyria. In later historic times the famous Greeks Pythagorus and Herodotus visited and were familiar with Egypt, — the former living, it is stated, for twenty-two years in the land of the Pharaohs.

§ 19 **A well developed Greek law antedates Roman law.** The value of ancient Greek law as a branch of comparative jurisprudence has been too long ignored. Perhaps this is due to the fact that no systematic collection of Greek laws has survived to us. An examination of the law of Greek States reveals that long before the 5th century B.C. Roman law of the XII Tables Greece had developed a law of persons, family law — including adoption, marriage, and inheritance — law of property and contracts, constitutional law, and international law,[23] all of which were far superior to the then law of Rome and became influential in assisting the subsequent development of Roman jurisprudence. That most eminent modern authority on Athenian law, the French Beauchet, lays much stress on the great debt of Roman law for legal ideas and conceptions borrowed from Greek jurisprudence.[24]

[17] 1870–73.

[18] 1876.

[19] 1884.

[20] Since 1900.

[21] See Hogarth, *Aegean civilization* (in Encycl. Britan.[11] vol. i, pp. 245, 247, 248, 250); Evans, *Crete* (in 8 Encycl. Britan.[11] pp. 421, 422, 426); Walker, *Greece*, (in 12 Encycl. Britan.[11] p. 441); Revillout, *Précis du droit égyptien*, vol. i, pp. 484, 565; Howe, *Studies in the civil law*[2], p. 87.

[22] Walker, *Greece* (in 12 Encycl. Britan.[11] p. 445).

[23] See Phillipson, *International law of Greece and Rome*, 2 vols., London, 1911.

[24] See Beauchet, *Hist. de droit privé de la répub. athén.*, 4 vols., 1897.

But the Romans were not slavish imitators, — they transformed what they borrowed into a thoroughly Romanized product fashioned by the Roman consummate legal genius.

As recently as A.D. 1895 in their revision of the Code of Civil Procedure, the New York commissioners to revise declared that the essential principle of trial by jury was probably borrowed by the Romans from Athens — the Roman *judices* who decided questions of fact resemble the Greek dicasterion (δικαστήριον).[25] Finally, it should never be forgotten that the modern ideas of freedom, democracy, and the duty of the individual to the State are based on the writings of a few great men of ancient Greece.

The most important Greek law is that of Crete, Rhodes, Sparta, Magna Graecia or Southern Italy and Sicily, Athens, and Egypt after the Macedonian conquest.

§ 20 **Crete.** Manifestation of law in Greece begins with the earliest age of Greek civilization, — the Minoan.[26] About 1500 B.C. there reigned in the island of Crete a semi-legendary King, Minos, whose name became to the Hellenes symbolical of law and legislation. His famous code of laws[27] exercised great influence on the law of subsequent Greek States as a model law. In his palace at Cnossus has been recently uncovered the celebrated labyrinth constructed by Daedalus.[28]

The 7th century B.C. Cretan laws known as the Laws or XII Tables of Gortyna discovered in 1884 reveal a very well developed family and property law.[29]

§ 21 **Rhodes.** Less than seventy-five miles to the northeast from Crete and directly in the usual course of mariners from Phoenicia to the Aegean sea lies the island of Rhodes, a maritime State and at one time mistress of the Mediterranean in early Hellenic history about 900 B.C.[30] But it was the Rhodian law which has given this little island everlasting

[25] 52 Albany Law Journal, pp. 390–99, 408–14.

[26] Evans, *Crete* (in 8 Encycl. Britan.[11] p. 426).

[27] Herodotus, iii, 122; Thucydides, i, 4.

[28] Evans, *Crete* (in 8 Encycl. Britan.[11] p. 422).

[29] See Roby, *XII Tables of Gortyna*, 2 Law Quart. Rev., p. 135 (1886), who gives an English translation thereof.

[30] See Diodorus, v, 55–9; xiii–xx passim.

fame. This law was composed of rules as to maritime transactions.[31] From Rhodes the Romans confessedly derived their maritime and admiralty law.[32] Consequently, as all modern law on this subject is based on the Roman, there is a perpetuity in our admiralty and maritime law of about three thousand years, all of which is a remarkable tribute to the enduring excellence of Rhodian law.

§ 22 **Sparta.** Institutions and laws were prescribed for the Lacedaemonians by Lycurgus, the traditional date of which is 884 B.C. The inspiration of the Spartan lawgiver is the Cretan laws of Minos.[33] Lycurgus reflects the Creto-Egypto-Phoenician influence.[34] Lycurgus' laws were, however, merely a body of traditional observances; for, according to Plutarch's biography,[35] these were never committed to writing.

§ 23 **Magna Graecia or Greek Southern Italy and Sicily.** In the 7th century B.C., Greek law was reduced to writing, this symptom of progress being first manifested in the western Greek colonies outside of Greece proper. In 663 B.C. Zaleucus gave a written code to the inhabitants of Locri Epizephyrii. Over two centuries later the people of Thurii adopted this same code. The Sicilian Charondas became the lawgiver of Catana and of other Greek colonies in both Italy and Sicily.[36] Androdamas of Rhegium gave laws to the Chalcidians of Thrace in Greece proper.[37] And Pythagoras[38] in 529 B.C. became the legislator of Crotona, a Dorian colony in Southern Italy situated on the Gulf of Tarentum. Returning home to Samos from his travels in Egypt and other foreign lands, he was driven away, according to tradition, by the tyranny of Polycrates and finally emigrated to Magna Graecia in the West, settling in Crotona. Here at the invitation of the citizens he

[31] The leading authority in English on the Rhodian law is Ashburner, *The Rhodian sea law*, Oxford, 1909.

[32] See *Dig.* 14, 2.

[33] Morris, *History of the development of law*, pp. 111, 112.

[34] *Id.*

[35] *Lycurgus*, 13.

[36] Aristotle, *Politics*, ii, 12, 11, vi (iv), 13, 2.

[37] At about this time Philolaus of Corinth became lawgiver to the Thebans. See Aristotle, *Politics*, ii, 12, 8–14.

[38] Born c. 582, died c. 497.

established republican institutions along philosophical lines, combining aristocratic and socialistic principles. It is interesting to note that this attempt of the great Samian philosopher to give practical operation to the doctrines of socialism did not long survive his death.

Athens. In the year 621 B.C. was compiled and published the celebrated code of the Athenian Draco. To the Athenians is given the credit of the invention of lawsuits by a Roman writer.[39] Draco's laws were extremely severe, and this explains the peculiar modern significance of harshness attached to our "Draconian." By the laws of Draco a creditor was given the right to seize the person of his debtor as security for his debt. § 24

Some thirty years later in 594 B.C. appeared the greatest legislator of Athens, Solon[40] the most famous of the "Seven Wise Men of Greece." Chosen to revise the code of Draco, Solon prepared a new code of law which was the best law in all Greece. Solon's legislation affected both the private and public law of Athens. He remodeled the courts and gave to every citizen the right of appeal to them. Solon was the first to give the right to Athenians to make a will.[41] By the laws of Solon land descended equally to all male children and to females if there were no male offspring. He forbade slavery of debtors by their creditors. He provided for the appointment of guardians of orphans. Adoption was authorized by law, and adopted children inherited from their adopter equally with other children. He prohibited any increase of interest on money lent when once fixed. His punishments for defamation and theft resemble the same in Egyptian law whence these were probably borrowed.[42] Solon's laws were the basis of Athenian institutions and legislation down to the Roman conquest of Greece, suffering only two revisions, one by Aristides about a century after Solon's death, the last by Pericles a half century later. Solon's laws were accepted

[39] Aelian, *Var. Hist.* iii, 38.

[40] To him is attributed the profound maxim "*Know thyself.*"

[41] See Plutarch, *Solon*, 21; Maine, *Ancient law*, ch. vi. This right was, however, limited to citizens without male descendants.

[42] As to other borrowings from Egyptian law, see Revillout, *Précis du droit égyptien*, vol. i, pp. 484, 565.

finally by most of the other Greek States, especially the Ionian, and came to exercise great influence on the subsequent law of Rome.

§25 **Egypt after the Macedonian conquest.** When Greece under Alexander the Great overcame in the 4th century B.C. the whole of civilized Asia and Africa, Egypt herself was thereafter ruled by the Greek Ptolemies for four centuries until Cleopatra's tragic death to avoid gracing the triumph of Augustus Caesar. Copies of wills and other legal documents of Greek soldiers settled in Egypt under the early Ptolemaic Pharaohs prove that the art of legal conveyancing was very familiar to the Greeks as early as the 3d century B.C. and earlier. For instance, in their wills is used that familiar modern expression "being of sound mind and good understanding" (*νοῶν καὶ φρονῶν*).[43]

[43] *Conveyancing under the Ptolemies*, 8 Law Quart. Rev., p. 56. As to the influence of Macedonian-Egyptian law, see Revillout, *Précis du droit égyptien*, vol. i, pp. 603–14.

CHAPTER IV

PERIODS OF THE HISTORY OF ROMAN LAW

§ 26 **Two periods.** The history of Roman law and its descent into modern law is divisible into two great periods or parts: Roman law as a local city law, and Roman law as a world law. These periods of the history of Roman law do not ignore the subdivisions into various Roman eras, or the decisive changes in the government of Rome, or the modern nations which have arisen since the destruction of the Roman Empire. Furthermore, this arrangement of the subject emphasizes the actual juridical connection between the ancient and modern worlds.

§ 27 **Roman law as a local city law.** The first period extends from the founding of Rome in 753 B.C. to the consolidation of Italy with Rome in 89 B.C. This is the period of the ancient Roman law. It embraces all of the Monarchy and nearly all of the Republic, the last half century of the latter excepted.

§ 28 **Roman law as a world law.** The second period or part of our history commences in 89 B.C., when Roman law became truly territorial and national by the union of the Italian peninsula with Rome. It embraces the last half century of the Republic and the whole of the Empire, the Eastern Empire being finally destroyed in A.D. 1453 by the Turks. It also embraces the subsequent fate of Roman law after the barbarian Teutonic overthrow of the Roman Empire in Western Europe. An account is given of the survival and revival of Roman law in medieval and modern times, including the development of modern Anglo-American law and the Modern Codes of France, Germany, Italy, Spain and other civilized countries through the fusion of Teutonic and Roman law.

PART I

ROMAN LAW AS A LOCAL CITY LAW— THE ANCIENT ROMAN LAW: 753–89 B.C.

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A period of over 650 years. Roman law as a local city law — the ancient Roman law — had a duration of over six and a half centuries. These include the almost entirely legendary period of the Roman Monarchy and all the historic period of the Roman Republic, except the last half century. As a result of the Social War, the Italians in 89 B.C. obtained the rights of Roman citizenship. Thereafter Roman law took on a national character and no longer remained merely the law of a city. §29

CHAPTER I

THE ROMAN MONARCHY: 753–510 B.C.

Semi-legendary part of the ancient Roman law. The traditional date of the founding of Rome is 753 B.C. Romulus, the founder, established a monarchical form of government which lasted for nearly two and a half centuries. In this semi-legendary era were the beginnings of the ancient Roman law or archaic jus civile. §30

Credibility of early Roman history. All Roman history, not only of the Monarchy but of the Early Republic, has been fiercely attacked as incredible by the English Sir George Lewis,[1] the Italian Pais,[2] and the French Lambert.[3] To a large extent their views are correct, and as a result all future historians §31

[1] See his *Credibility of Early Roman history.*

[2] See his *Storia di Roma*, pp. 550–605.

[3] See Nouv. revue hist. (1902), pp. 546–76, 631–5; Revue générale du droit (1902), nos. 5 and 6.

must on no account ignore their conclusions. Fact and fiction are so closely interwoven in early Roman history that it is most difficult to-day to separate traditions from actual occurrences. But the principal features of early Roman history are not falsified; that there was a Monarchy, that it was overthrown — the traditional date being 510 B.C., that there was a struggle between the two Roman classes of patricians and plebeians, that a Republic was instituted with a senate and two legislative assemblies — the comitia curiata and the comitia centuriata — all three coming down from the regal period, are not fables.

§ 32 **Royal statutes (leges regiae).** The jurist Pomponius has described the preservation of the whole of the statutes of Romulus and subsequent kings in a collection known as the *jus Papirianum*, which compilation he says[4] was extant in his own time, — that of Hadrian. But this collection of royal laws mentioned by Pomponius was probably a private apocryphal compilation made, toward the close of the Republic,[5] of the "copies of ancient matter which had been thrown into the form of rules or ordinances."[6]

That there were royal statutes which are sources of Roman law is without doubt true.[7] Certain isolated fragments of royal statutes are extant,[8] such as those credited to Servius Tullius on contracts and delicts.[9] Probably the royal laws were in the nature of "ordinances made by proclamation, and in some cases perpetuated by public inscription." Enactments by a popular legislative assembly are improbable in the Regal period of Roman history.[10] Our scanty remnants of the

[4] *Dig* 1, 2, 2, 2

[5] Sohm, *Institutes of Roman law* (Ledlie[2]), § 12, p 54, note 4, Girard, *Textes*[3], p 3, § 1, Mommsen, *Staatsrecht*, § 3, pp 46–50, Karlowa, *Rom Rechtsgeschichte*, pp 105–7 Krueger, *Quellen, etc*, pp 3–8· Girard, *Manuel*[3], pp 14–15, Girard, *Ord judiciaire*, p 27, note 1, Dirksen, *Versuche zur Kritik, etc*, pp 234–358

[6] Clark, *Sources*, p 19

[7] Clark, *Sources*, p 19

[8] See collection of each "leges regiae" made by Bruns, *Fontes Juris*[5], pp 1–22, Girard, *Textes*, pp 1–9

[9] See *Dion* IV, 13, iv, 15 IV, 22 and 25, Bruns, *Font Juris*[6], p 14

[10] Clark, *Sources*, p 19

Roman royal statutes are derived from the works of writers of the Later Republic or Early Empire.

The law of the Monarchy was the archaic jus civile only. § 33 The private law at Rome under the Monarchy was for citizens only, and did not concern itself with foreigners, who were not subject to its jurisdiction. Hence its appropriate name — the jus civile, or law belonging to Roman citizens only.[11] Moreover, its name indicates another characteristic: it was the law of a city[12] — a local law strictly.

[11] *Civile* and *civis* (citizen) come from the same root.

[12] *Civile* has the same root meaning as *civitas* (city).

CHAPTER II

THE ROMAN REPUBLIC TO 89 B.C.

§ 34 **Historic part of the ancient Roman law.** From the overthrow of the Monarchy in 510 B.C. to the consolidation of Italy with Rome in 89 B.C. is over 400 years. These four centuries constitute the historic jus civile of the Republic or the historic part of ancient Roman law.

I. The Early Republic, or first half of the Republic, prior to the conquest of Central and Southern Italy and the appointment in 242 B.C. of a praetor for foreigners (praetor peregrinus): period of the historic jus civile alone

§ 35 **Expulsion of the Tarquin dynasty; class struggles of the patricians and plebeians soon engross the young Republic.** As a result of expelling the Tarquin Kings, thereafter the Romans forever hated the name of 'King.' At the time of the overthrow of the Monarchy Rome was but a small, insignificant country town which had to struggle hard for life against its neighbors and the adherents of the monarchy. The new Republic became engrossed with the class struggles of the patricians and plebeians. The patricians — originally meaning "the sons of senators," [1] — and the plebeians — from a Greek word [2] signifying "crowd" or "mob" — occupied the first two centuries of the Republic with their political and economic strife. Finally, the plebeians achieved full political, civil, and social equality, and were protected by a

[1] Bernard, *La première année de droit romain*, § 3; Sherman's translation, *The first year of Roman law*, § 3.

[2] Τὸ Πλῆθος

magistrate — the tribune of the plebs — elected annually, inviolable during his term of office, and possessed of the power to arrest by his "veto" (I forbid) all magisterial and legislative acts done within the city of Rome.

§36 **The Law of the XII Tables fixes the commencement of historic Republican Rome.** The beginning of the non-legendary Roman Republican period is definitely fixed by the Law of the XII Tables enacted in the middle of the 5th century B.C. The modern inquiry of Professor Goudy, "Are the XII Tables authentic?"[3] is but a continuation of the attacks of Lewis, Pais,[4] and Lambert[5] on the credibility of early Roman history. These writers attacked the XII Tables as legendary, and argued that the decemvirate never existed, nor were the XII Tables compiled under the early Republic, but that on the contrary the collection known to the ancients under this name is an apocryphal work made in the late Republican period.[6]

But the battle as to the authenticity of the XII Tables was won in 1902 by their able defender, the French Girard[7] of the law faculty of the University of Paris, who successfully refuted all these contentions.

§37 **The Law of the XII Tables, 450–449 B.C.** The compilation of the XII Tables was due to the persistent demands of the plebeians for a *written law*, and resulted directly from the proposal of one of their tribunes, Terentilius Arsa. According to Latin historians,[8] commissioners were sent into Greece to study Hellenic laws: this probably was Magna Graecia —

[3] 17 Juridical Review, p. 93.

[4] *Storia di Roma*, i, 1, pp. 550–605 (1898).

[5] Nouv. revue historique (1902), pp. 546–76, 631–5; Revue générale du droit (1902), nos. 5 and 6.

[6] In the 5th or 6th century of Rome, — Girard, *Textes*[3], p. 9.

[7] Nouvelle revue historique de droit (1902), pp. 381–436. Professor May, in Revue des études anciennes (1902), 3, pp. 201–12, agrees with Girard. See also Girard, *Textes*[3], pp. 9–11; Clark, *Sources*, p. 29.

[8] For the Roman account of the XII Tables, see Livy xii, 9–57; Cicero, *De repub.* ii, 36–37; Diodorus, xii, 23–26; Dionysius, x, 1–60; Digest, 1, 2, 2, §§ 3, 4, and 24 (Pomponius). See also Mommsen, *Staatsrecht*, iv, pp. 441–3; Krueger, *Quellen, etc.*, §§ 9–14. Girard, *Manuel*[5], pp. 22–8.

the Greek colonies in Southern Italy — which for Romans was the easiest point of contact with Greek civilization.[9]

When the commissioners returned, ten magistrates, called Decemvirs, — the most celebrated of whom was Appius Claudius — were appointed to codify the laws, or, more accurately, to reduce them to writing. The first year of their magistracy, 450 B.C., ten Tables were published in the forum, followed by two more the next year 449 B.C. This decemviral legislation was exhibited to the people in the form of a popular statute (*lex*).

The now existing fragments of the XII Tables[10] were expressed subsequently by various Latin authors living four to six centuries later, the contents of the XII Tables being "probably handed down by . . . copies from time to time renewed."[11] Things were not much improved even at the very close of the Republic: Cicero himself complained that in his time there was no official depository of the laws, which had to be sought for in private collections.[12] "For all the Roman law prior to 200 B.C. when the basis of Justinian's vast structure had long been laid, we have to rely on the secondary evidence of writers who lived in the beginning of the Christian era or just before it."[13]

§ 38. **Character of the Law of the XII Tables.** The XII Tables are a compilation or reduction to writing of the then existing customary unwritten law of Rome. That Greek elements entered into the Roman XII Tables "is beyond doubt," says the famous modern German Romanist Bruns.[14] And this

[9] Such is the view of Cuq, *Institutions*, etc., vol. i, p. 131, who is quite sceptical as to the commissioners going to Greece proper; Girard, *Manuel*[5], pp. 22–8.

[10] For the text, see Bruns, *Fontes Juris*[6], pp. 15–41; Girard, *Textes de droit romain*[1], pp. 5–23 The XII Tables have been translated into English by Howe, *Studies in the Civil Law*[2], pp. 47–59; Hunter, *Roman law*[4], pp. 17–22; and by Mears, in his *Inst* of *Justinian*, London, 1882.

[11] See Clark, *Sources*, p. 22, Bruns, *Fontes Juris*[6], p. 22 et seq., Girard, *Textes*,[1] p. 9.

[12] About 46 B.C.,—see *De legibus*, iii, 20, 46.

[13] Clark, *Sources*, p. 29. Such secondary authorities include Cicero, Livy, Plutarch, Pliny, Dionysius.

[14] *Geschichte und Quellen des rom. Rechts*, § 14; see Holtzendorff, *Encyclopadie der Rechtswissensch.*[3], p. 92.

view is substantiated by comparative study of contemporary Greek law,[15] especially the Tables of Gortyna, which embody Hellenic law much earlier than the Roman XII Tables.[16] But on their face the XII Tables are very little Greek in character, especially the peculiarly Roman constitution of the patriarchal family with absolute power wielded by the head of the family, and the extremely Roman procedure of legal actions furnished by statute (*legis actiones*).

The XII Tables embodied the jus civile or law for Roman citizens. Commerce being small at this time and the world moving but slowly, the XII Tables took cognizance of but few juristic acts and these principally relating to land, the chief property of citizens.

§ 39 **Growth of Roman law for the next three centuries is by interpretation of the XII Tables.** After the XII Tables were enacted their contents were worked out for over 300 years by a process of interpretation. Under the Republic statutory changes in matters of private law were exceptional.[17] To meet the exigencies of the growing State and the demands of a commerce which increased with the ever widening Roman conquests, new regulations of law were required: these were always represented by the interpreters of the law, as contained in the Law of the XII Tables, either by logically deducing them from that statute, or by the employment of *legal fictions*, which left the letter of the statute intact while developing its spirit — thus making new juristic transactions possible. For example, by application of a legal fiction to mancipatio (the ancient Roman law conveyance of sale) was evolved a new transaction resting on credit — the pledging of property for a loan: the mancipatio was made really fictitious by being conditioned on an understanding (*fiducia*) that the property would be reconveyed by the creditor to the debtor when the latter paid off his debt.

[15] See Goodwin, *XII Tables* pp. 6 and 7; supra §§ 19 et seq.

[16] See supra, § 20.

[17] For extant *leges* subsequent to the XII Tables, see Bruns, *Fontes Juris*[6], pp. 45–160; Girard, *Textes de droit romain*[3], pp. 24–117; and infra vol. iii, § 945.

§ 40 **The jus civile was for citizens only; it was administered at Rome by the city praetor (praetor urbanus) created 367 B.C. Character of the jus civile.** Inasmuch as the statute law bound the citizens of Rome, it was collectively called *jus civile*, i.e. the law for citizens — the "civil law." It was administered at Rome in the court of the city praetor (*praetor urbanus*), who was created 367 B.C.[18] The jus civile was for the exclusive benefit of Romans only, and did not concern itself with foreigners and Roman provincial subjects, who were outside its jurisdiction and purview. No alien or non-citizen could appear in the court of the praetor urbanus.

Roman law under the Republic was personal, not territorial. Wherever a Roman citizen went, he carried his law with him. Although its seat was at Rome, yet with the advent of conquered provinces their governors became empowered to administer the jus civile for any Roman residing abroad. This law for citizens, or *Quiritary law*,[19] had certain peculiar characteristics: it was very formal, rigid, and personal. Its essential rigidity was not changed by any interpretation, and its formal ceremonies survived the use of fictions.

§ 41 **Birth of the jus honorarium.** The creation of the praetor urbanus in 367 B.C. had one very lasting consequence: it eventually gave birth to the jus honorarium or edictal Roman law. For by the power (*imperium*) of the praetorship the praetor had authority to issue orders — edicts — as to the remedial processes necessary to be employed in his court. Although it is not likely that the city praetor began at once to use this great power, yet gradually this power came to be exercised, and, after the creation of the praetor for foreigners (*praetor peregrinus*), this praetorian power became of the utmost importance and was the means of developing the Roman law for foreigners[20] — ultimately the most equitable part of Roman law. The jus honorarium originally was purely praetorian law, but in the Later Republic and Early

[18] By the *lex Licinia*, "Qui jus in urbe diceret" are Livy's words (vi, 42, 11). See *Dig.* 48, 19, 17, 1

[19] From *Quirites*, the ancient title of Roman citizens.

[20] See infra § 44.

Empire it also included the edicts of other magistrates such as aediles and provincial governors.)

II. The Later Republic, or the latter half of the Republic following the creation of the praetor peregrinus; period of the beginnings of the jus gentium as an adjunct to the jus civile

The Roman conquest of Southern and Central Italy. In the 4th century B.C. Rome began the subjugation of Italy. After a half century of effort following the Second Samnite War, all the Italian peoples were brought under the Roman yoke. Not even the Greek armies of King Phyrrus of Epirus could prevent the Roman conquest of Southern Italy. Between 326 and 272 B.C. Campania, Umbria, Lucania, Etruria, Picenum, and Tarentum were subjugated. Rome became supreme mistress of Italy from the Rubicon to the Sicilian Straits. And her conquest of Italy survived the terrific strain of the Punic Wars with Carthage, in spite of the wonderful genius of Hannibal. But Rome treated the Italians as subjects. The Italians were regarded as subject foreigners (*peregrini*). Not until two centuries after the conquest of Italy were the Italians given Roman citizenship. § 42

Growth of commerce; creation of a praetor for foreigners (praetor peregrinus) in 242 B.C. What changed Roman law from a local rigid formal law into a world-wide rational formless jurisprudence? The answer is: the growth of foreign trade and commerce, the legal problems of which were solved by the praetor's application of the rules of the law of nations (*jus gentium*). With the increasing territorial conquests of Rome, foreign commerce developed enormously. Foreigners flocked in great numbers to Rome. Legal transactions arose in large volume. Two centuries after the XII Tables, in the year 242 B.C.,[21] a special praetor to dispense justice to foreigners § 43

[21] Livy (*Epit.* 19) says it was in 512 A. U. C. Lydus (*De Magistr.* i, 38, 45), says it was 507 A. U. C.

was created — the praetor peregrinus. He had charge of litigation in which alien foreigners or subjects were involved.[22]

§ 44 **Beginnings of the Roman law for foreigners or jus gentium; separation of Roman law into jus civile and jus gentium.** With the advent of the praetor peregrinus began that equitable praetorian adjunct to the Civil Law[23] which was known as the jus gentium or Roman law for foreigners and subjects not citizens. The Roman source of this jus gentium was the law made by the magistrates or jus honorarium. Practically the whole of the newer equitable law was to be found only in the magisterial law, and the only way it could be enforced was through the medium of legal procedure — by granting or refusing a right of action or a right of defense.

Roman law now began to develop along parallel lines. There was *the old law* for citizens — the *jus civile*. There was *the new law* for non-citizens (foreigners and subjects) — the *jus gentium*. The jus civile was composed of statutes and customs having the force of law. It was largely legislative law. The jus gentium was law made by magistrates, who drew partly on the jus civile and very largely on those rules of law common to all nations, particularly the neighboring Greeks, as the sources of their inspiration. It was a body of rules which the Roman praetor thought worthy to govern the intercourse of Roman citizens with the members of all, originally independent but now subject, foreign nations.[24] Occasionally, however, the Romans use the term jus gentium in its modern sense of the "law of nations," that is, "international law."

These two systems of law — *jus civile* and *jus gentium* — continued down through the Later Republic into the Empire, when finally the older jus civile became fused with the jus gentium losing in the refining process all its local narrowness and formal strength. The combined product became the jurisprudence of a world, — a universal and no longer a local law.

[22] Mentioned in Republican legislation and inscriptions as "Praetor qui inter peregrinos jus dicit," or "Praetor qui inter cives et peregrinos jus dicit," or simply "Praetor peregrinus." See *Dig.* 1, 2, 2, 28.

[23] The Romans meant by "civil law" the jus civile or law for citizens only, never "private law" as in modern legal phraseology.

[24] Poste, *Gaius*[4], p. 3.

Secularization of the legal profession; the secret legal knowledge of the college of priests divulged. Development of the functions of the Roman jurisconsult or lawyer. § 45 The knowledge and practice of the law, so long the secrets of the pontifices or college of priests, were gradually communicated to the world as plebeian influences, penetrated the sacred college, and finally law became secularized. This process of secularizing the law, which began in the 4th century B.C. when the actions furnished by statute (*legis actiones*) were divulged,[25] was given an enormous impetus in the 3d century[26] B.C. by the first plebeian pontifex maximus Tiberius Coruncanius, who was the first to give *public consultations* to persons needing legal advice. By the 1st century B.C. men giving legal advice and answering legal questions were called jurisconsults (*jurisconsulti*, skilled in the law), and the lawyer had long since ceased to be a priest. Moreover, the lawyer's practice soon became the stepping stone to the highest offices of the Roman State.

The functions of the lawyer or jurisconsult were developed. These were like those of his modern descendant: to give legal opinions,[27] to act in court for clients,[28] and to draw up legal papers,[29] such as contracts and wills. Cicero had a thorough Roman understanding of what a lawyer should be when he said that he must be "skilled in the laws and the usages among private citizens, and in giving opinions, in bringing actions, and in guiding his clients aright."[30]

[25] Flavius published them 302 B.C., Aelius in his *Tripertita* published them together with the XII Tables and their interpretation about 204 B.C., — see Sohm (Ledlie[3]), *Roman law*, p. 89.

[26] C. 254 B.C.

[27] *Respondere.*

[28] *Agere.*

[29] *Cavere.*

[30] See *Duties of an attorney* by Judge Gager, 21 Yale Law Journal, p. 73, wherein this is quoted and its applicability to modern lawyers set forth.

PART II

ROMAN LAW AS A WORLD LAW— 89 B.C. TO THE PRESENT TIME

PART II

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A period of over 2000 years. (Roman law as a world law has already endured twenty centuries. This vast period includes the last half century of the Roman Republic, and the Roman Empire which existed for fifteen centuries until Constantinople was taken by the Turks in A.D. 1453. It also includes the modern realm of Roman law since Justinian to the present time, or the modern Civil Law.) §46

CHAPTER I

THE LAST HALF CENTURY OF THE REPUBLIC: 89–27 B.C.

Consolidation of Italy with Rome in 89 B.C.; Roman law became widely territorial and national. As a result of the great Italian war 90–89 B.C., called rather loosely the Social War, the revolted Italian allies and subjects of Rome obtained Roman citizenship and were enrolled in the thirty-five Roman tribes. The consolidation and incorporation of Italy with Rome was the final outcome of the Roman conquest of Italy. During the last half century of the Republic and continuing after the establishment of the Empire by Augustus in 27 B.C., Roman citizenship belonged to all the Latin peoples of the Italian peninsula. Roman citizenship and law became widely territorial. Rome and Italy thus became synonymous — the peninsula constituting the Roman State. §47

1. SOURCES OF ROMAN LAW DURING THE REPUBLIC

§ 48 **Three sources.** The sources of law during the Roman Republic were: statutes of the legislative assemblies, edicts of the praetor and other magistrates, and opinions and writings of the jurisconsults.

§ 49 1. **Statutes of the assemblies (leges, plebiscita).** The earliest source of Roman law consists of the statutes enacted by the various legislative assemblies. The principal Roman assemblies were these four: (1) the *comitia curiata* or assembly of the patricians, (2) the *comitia centuriata* or military assembly of all citizens, both patrician and plebeian, (3) the *comitia tributa* or assembly of all citizens by districts,[1] (4) the *concilium plebis* or assembly of the plebeians. The first two assemblies originated under the Monarchy. Although the assembly of the plebeians originally legislated to bind the plebs alone, the binding force of the acts of this assembly was extended by the lex Hortensia of 288 B.C. to bind the patricians also. The enactments of all these Roman assemblies were statutes, which, as in modern times, were of a general or special nature.

The enactments of all the legislatures except the assembly of the plebeians were termed *leges*. Laws passed by the assembly of the plebeians were termed *plebiscita*. The *lex* bears the names of the two consuls for the year, e.g. *lex Valeria Horatia*, while the *plebiscitum* bears only the name of the tribune who proposed it. Sometimes both *lex* and *plebiscitum* were confused, — for instance the famous *lex Aquilia* and the *lex Falcidia* were actually *plebiscita*. Frequently the legislation of a provincial governor ordered to endow his province with laws is called *leges datae*.

Senate acts or the decrees of the Senate (*senatusconsulta*) were not ordinarily a source of Roman law during the Republic. In the Republican period the Senate, which originated under

[1] *Tribus* here means a "quarter" of the city. The people were grouped according to residence in wards or districts. The assembly voted by districts. The balance of power was preserved for the better classes of citizens by dividing the districts into four urban and twenty-four suburban, — the great mass of the people residing in the urban districts.

the Monarchy, did not often legislate.[2] The functions of the Senate during the Republic were: to prepare bills for laws, to take care of the public administration, and to register the laws enacted by the popular assemblies. Although the Senate was the real sovereign of the Republic, it was a sovereign not usually armed with legislative power.

§ 50 **2. Edicts of magistrates (edicta).** Another early source of law in the Republican period of Roman history is the edicts of magistrates, especially the praetor. When the praetor, the chief judicial magistrate of the Republic, entered annually into office, he published his edict which stated the collection of rules he intended to apply while in office. To this so-called 'permanent edict' he added from time to time decisions of cases for which his permanent edict did not apply.

In imitation of the praetor, the aediles (police magistrates) and the governors of provinces published their edicts. And this sort of law was known as the praetorian law or the law of the magistrates (*jus honorarium*) in contradistinction to the law for citizens (*jus civile*). The edictal law will be treated in a more detailed manner when the Imperial Roman law is reached.[3] The other magistrates of senatorial rank — consuls, censors, pontifices, quaestors, and the rarely existing dictator — were not judicial officers and contributed nothing in the way of judicial legislation.

§ 51 **3. Writings of the jurists.** The activities of the lawyer had one very important juridical consequence: the development of a legal literature, as is evidenced by the composition of treatises on legal subjects by distinguished jurisconsults of the Republic.

2. FAMOUS REPUBLICAN JURISTS

§ 52 **The dawn of jurisprudence.** With the advent of the jurisconsults began the gradual conversion of Roman law into a world law. Jurisprudence commenced with the writings of the jurists. Q. Mucius **Scaevola,** who was consul[4] a few years

[2] But toward the end of the Republic the decrees of the Senate began to be regarded as equivalent to *leges*, — see Amos, *Roman Civil Law*, p. 73.

[3] See infra §§ 60–61.

[4] 95 B.C.

before the Social War broke out, was the father of Roman jurisprudence.[5] The Republican jurisconsults shaped the beginnings of Roman law; the jurisconsults of the Empire developed Roman law into a mature jurisprudence fitted to be a world law. The lives and toil of these jurists mark the steps and boundaries of progress in Roman law.

§ 53 **Famous Republican jurists.** Of the vast host of lawyers of Republican Rome some forty-five are mentioned by Roman writers as renowned for their legal talents or famous for their learning. Pomponius[6] — a celebrated jurist of the Imperial period — Gellius, and Cicero are our chief sources of information as to the Republican jurists.[7]

A celebrated early Republican jurist is **Cato the younger,**[8] the son of Cato the Censor. He is referred to in both the Institutes and Digest of Justinian. He died while praetor-designate in the lifetime of his father. From Cato the younger was probably derived the Regula Catoniana — a doctrine of testamentary law to the effect that a legacy invalid at the time of making a will is also invalid whenever the testator dies.[9]

Three Republican jurists were renowned for their constructive ability: Brutus, Manilius, and Scaevola. They contributed enormously to the development of a Roman legal literature. From **Brutus**[10] (not the one who conspired against Caesar but an earlier Brutus) came a familiar doctrine now encased in the modern law of bailments. Brutus held that if a man borrowed a beast of burden and used it otherwise than had been agreed upon, as for example for a longer journey or for a different journey, he is guilty of theft.[11] To

[5] Cuq, *Institutions, etc.*, vol. ii, p. 1, starts the "classical Roman law" with Scaevola.

[6] See *Dig.* 1, 2.

[7] As to their writings now extant, consult Lenel, *Palingenesia juris civilis*, 2 vols., Leipzig, 1889.

[8] See Roby, *Introduction to the Digest*, p. xcv

[9] Dig. 34, 7, 1; Bernard, *La première année de droit romain*, and *First year of Roman law* (Sherman, translator), § 890.

[10] His full name was M. Junius Brutus. See Roby, *Introduction to the Digest*, pp. xcv–xcvi.

[11] Gellius, vi (vii), 15; see also *Dig.* 47, 2, 77 (76), pr.

Manilius,[12] who was consul at the siege of Carthage,[13] is largely (§ 53) due the development of the doctrine of treasure trove.[14] **Scaevola,**[15] who was consul the year of Tiberius Gracchus' legislation,[16] was a thorough jurist and decided many novel questions of law.[17] This P. Mucius Scaevola was the father of a still more famous son,[18] usually called the Pontifex.[19]

It was **Scaevola the younger**[20] who, when governor of Asia, provided in his edict that want of good faith can be pleaded against the validity of a transaction, — a principle of modern law.[21] This Q. Mucius Scaevola composed many other legal principles.[22] The glory of Scaevola as a jurist consists in the fact that he was the first to write a systematic treatise on the jus civile. It was composed of eighteen books. Scaevola's works were so valuable that these later received commentators, among these being the Republican jurist Sulpicius[23] and the Imperial jurists Gaius[24] and Pomponius.[25] Scaevola is the earliest Republican jurist whose writings are cited in the Digest of Justinian. Scaevola had some famous pupils. Among these were Cicero[26] and Aquilius Gallus.[27]

[12] His full name was M. Manilius P. F. P. N. See *Corp. Inscrip. Lat.*, i, p. 438; Roby, *Introduction to the Digest*, pp. xcvi–xcviii.

[13] 149 B.C.

[14] See *Dig.* 41, 2, 3, 3.

[15] P. Mucius Scaevola, — Roby, *Introduction to the Digest*, pp. xcviii–c.

[16] In 133 B.C. Tiberius Gracchus died the same year.

[17] See *Dig.* 24, 3, 66; *Dig.* 47, 1, 10 and 15; Cicero, *Fam.*, vii, 32; *Dig.* 49, 15, 4; *Dig.* 50, 7, 18 (71); Cicero *Or.* i, 40; Roby, *Introduction to the Digest*, pp. xcviii–c.

[18] Q. Mucius Scaevola, usually called "Q. Mucius" to distinguish him from Cervidius Scaevola, a jurist of the Early Empire.

[19] To distinguish him from his counsin Scaevola the Augur, consul 117 B.C., who bore the same names.

[20] Q. Mucius Scaevola, — Roby, *Introduction to the Digest*, pp. cv–cviii.

[21] Cicero, *Att.*, 6, 1, 15.

[22] See Roby, *Introduction to the Digest*, pp. cvii–cviii.

[23] *Dig.* 27, 2, 30; Gellius iv, 1, 20.

[24] Gaius 1, 188.

[25] *Dig.* 49, 1, 53 and 54.

[26] See *Dig.* 1, 2, 2, 41.

[27] Cicero *Am.* 1; Roby, *Introduction to the Digest*, p. cvii.

(§ 53) As to **Cicero,**[28] the best opinion is that, although the greatest advocate ever called to the Roman Bar, he was not a great lawyer in the sense of being a jurist. But Cicero's oratory and writings bear a stamp of brilliancy and literary greatness excelled by no other ancient orator or writer — certainly of the Latin race. To Cicero must be ascribed whatever we intimately know of the Roman law of the Republic, especially of its judicial forms and remedies.

C. Aquilius **Gallus,** contemporary and friend of Cicero, was the most learned and juridically ingenious of all the pupils of Scaevola the younger. It was Gallus who advanced the doctrine that a postumous child can be heir to a succession.[29] Gallus was the author of several other new principles in Roman law.[30]

Sulpicius,[31] the famous pupil of Gallus, was regarded by the Digest writers as the greatest lawyer of the Republic. Stung one day by the reproach of Scaevola the younger[32] as to his ignorance of the law, he engaged in the study of law and later became a learned and prolific jurist, having written, it is said, 180 books on law. Sulpicius had many renowned pupils, such as **Varus, Gellius, Tucca, Namusa, Ofilius.**[33] Most of these are cited in the Digest of Justinian.

Aulus **Ofilius** deserves a special mention. He was a great jurist and wrote works which dealt with all branches of the Civil Law.[34] It is a suggestive coincidence of his intimate friendship with Julius Caesar that Caesar himself, amongst other plans formed before his assassination, had in mind the project of codifying and digesting Roman law,[35] — a task not however accomplished until six centuries later in the time of Justinian, whose fame to-day comes from his codification.

[28] His full name was Marcus Tullius Cicero (106–43 B.C.).

[29] *Dig.* 28, 2, 29. He was the author of the Aquilian stipulation, — see Roby, *Introduction to the Digest*, p. cx.

[30] Roby, *Introduction to the Digest*, pp. cix–cx

[31] His full name was Servius Sulpicius, Q. F. Lemonia Rufus, — see Roby, *Introduction to the Digest*, pp. cx–cxiii.

[32] Q. Mucius Scaevola, see supra this § 53.

[33] See Roby, *Introduction to the Digest*, pp. cxiii et seq.

[34] *Id.* pp. cxiv–cxv.

[35] Suetonius, *Jul*, 44.

Tubero[36] was a pupil of Ofilius. He was very learned and is often cited in the Digest. (§ 53)

Trebatius,[37] contemporary of, but younger than, Cicero, is often cited in the Digest. It was Trebatius who was instrumental in introducing the doctrine of codicils into Roman law.[38]

[36] His full name was Q. Aelius Tubero, — see Roby, *Introduction to the Digest*, pp. cxxii–cxxiii.

[37] His full name was C. Trebatius Testa, — see Roby, *Introduction to the Digest*, pp. cxvii–cxx.

[38] *Inst.* 2, 25.

CHAPTER II

THE ROMAN EMPIRE, 27 B.C.–A.D. 1453

§ 54 **The Roman Empire lasted nearly 1500 years.** The Roman Republic in Caesar's day was fast becoming an empire; it had markedly outgrown its archaic city government ruled by a narrow, corrupt, and tyrannical oligarchy which rapaciously plundered the Roman people as well as the provinces. It became necessary to reconstruct Rome if the Roman conquests and the Roman State were to be saved. The Graeco-Latin civilization was in great danger of being lost to the world. Julius Caesar applied himself to the much-needed task of reconstruction. What this wonder of the human race with his most astonishing political and military genius might have finally accomplished was untimely cut short by the daggers of his assassins. His clemency, unparalleled in a cruel age, was largely responsible for his martyrdom. But the eternity of Rome for which Caesar lived and died was preserved in spite of Caesar's murderers. The work of reconstruction finally devolved upon Augustus.[1] The Empire was established in 27 B.C., and continued for nearly fifteen centuries until A.D. 1453 when the Eastern Roman Empire at Constantinople was overthrown by the Turks.

I. The Early Empire, 27 B.C.–A.D. 284: from Augustus to Diocletian

§ 55 **Dual nature of the government of the Early Empire; the Principate.** Although Augustus apparently re-established the Republic on conservative lines, restoring the authority of the people and the Senate,[2] yet this surrender of sovereign power

[1] Octavian, the nephew of Caesar, received the title of Augustus in 27 B.C. This title was subsequently incorporated by the later Emperors, not members of the Julian family, as part of the Imperial title.

[2] "Rem publicam ex mea potestate in senatus populique Romani arbitrium transtuli." — *Mon. Ancyr.* 6, 12.

was but theoretical and illusory. Augustus ostentatiously (§55) divided the sovereign authority between himself and the Senate, but by the terms of this division he made the Senate the weaker body and himself the ultimate though unacknowledged source of all authority whatever. Although the régime established by Augustus gave a preponderance to the Emperor, yet, because the Principate or Early Imperial government was a dual government of Senate and Emperor as opposed to the single absolute monarchical power of Diocletian and Constantine, the government of the Early Roman Empire prior to Diocletian is fittingly described as the Imperial duarchy.

Apparently the Republic continued to exist along constitutional lines with all the familiar legislative assemblies and elective magistrates exercising their usual functions. No magistracy was abolished: there were, just as during the Republican era, consuls, praetors, and tribunes. The Roman provinces were divided, as to administrative control, between the Senate and Augustus, — the latter taking care to give to the Senate only the more peaceful ones requiring scarcely any troops. The public treasury of the State, the *aerarium*, still received the taxes from the senatorial provinces, but the taxes from the provinces of Caesar went into the Emperor's treasury, the *fiscus*. Augustus received the constitutional title of *Princeps*,[3] and this title of professed humility became a formal title of his successors[4] during the Early Empire. Theoretically, the Senate elected the Emperor; and it could depose him, as it did with respect to Nero.

But in reality Augustus was far more than seemingly the first citizen of Rome: he had been made *Imperator*, which implied that his authority was supreme; he had also the *tribunician power* which made his person inviolable and gave him the right of *veto* over all magistrates; he was possessed of the *censorial power* which enabled him to fill the ranks of the

[3] In 28 B.C. the Senate conferred the title of *Princeps Senatus* upon Octavian.

[4] In course of time the Heir Apparent of the Emperor became known as *Princeps Juventutis*, 'Crown Prince' or 'Prince Imperial,' — see Hill, *Historical Roman coins:* "Caius Lucius Caesares, Augusti filii, consules designati, *principes juventutis.*"

Senate or expel a Senator; he was *Pontifex Maximus*, which gave him the religious authority formerly exercised by the Kings of Rome; and he had full *proconsular authority*, which gave him the command of all the armies of the Empire. Finally, Augustus gradually allowed the Senate — which he really held in the hollow of his hand — to usurp the legislative powers of the *comitia*. The successors of Augustus received the same powers, all at one time, upon their accession by the effect of a statute originally re-enacted for each Emperor — called the *lex regia* or *lex de imperio*.[5] It was passed by the Senate and originally ratified by one of the *comitia*, probably the *comitia tributa*. With the decline of the legislative assemblies in course of time the existence of a *lex regia* applicable to all Emperors became implied.[6]

§ 56 **Dual nature of the Roman law of the Early Empire.** The antithesis between the Roman law for citizens (jus civile) and the Roman law for non-citizens (jus gentium) which began in the latter half of the Republic, persisted under the Early Empire for over two centuries until the Edict of Caracalla in A.D. 212. Moreover, that very practical Republican division of Roman law, according to sources, into statutes and customs (jus civile) and law made by the magistrates (jus honorarium), endured under the Early Empire down into the reign of Hadrian, when the importance of this division was nullified by the jurist Julian's compilation of the Edictal law, which was promulgated in the form of a statute.[7]

§ 57 **The classical period of Roman law, A.D. 98-244.** The culmination of the development of Roman law from a local city law into a world law occurred under the Early Empire. But this culmination came gradually and was not caused suddenly as if by the blast of a hurricane. The jus civile was slowly submerged by the jus gentium, because the latter was more

[5] See *Code*, 1, 17, 1, 7; *Dig.* 1, 4, 1, pr. There is still extant a part of the *lex regia de imperio* which conferred imperial power upon Vespasian, — see Girard, *Textes de droit romain*[4], p. 105. The practice was a survival of the *lex curiata* of the regal era of Rome, — see Cicero, *De republica*, ii, 13, 17, 18, 20, 21.

[6] See Const. *Deo auctore*, §7 (one of the prefaces to the Digest of Justinian).

[7] See infra § 61.

inherently reasonable and just and more in accordance with the private law of other nations. From the 2d century to the middle of the 3d century A.D. was the Golden Age of Roman jurisprudence, beginning with the jurist Celsus[8] and ending with Modestinus.[9] Through the labors of the Imperial jurists, Roman law in the century of the Antonines and Severi attained to such marvelous perfection that the whole period from the reign of Hadrian[10]—better, Trajan[11]—until shortly after the close of the reign of Alexander Severus is commonly called the "classical Roman law."[12] During this era the activity of Roman jurists reached its climax. The Imperial jurisconsults accomplished the larger part of the gigantic task of *creating a jurisprudence* composed of eternal principles of justice and fitted for all subsequent ages of the world. And because of the great excellence of the private law of Rome about A.D. 100, the Romans attained to a height of civilization never reached by Rome's successors until very modern times.

Carracalla's Edict of A.D. 212. In the year 212[13] the Emperor Caracalla promulgated a law[14] bestowing citizenship on all free inhabitants of the Empire.[15] Thereafter, but few traces of the long-standing Roman antithesis between complete and partial citizenship remained, and these[16] were formally §58

[8] P. Juventius Celsus *filius*, legal adviser of the Emperors Trajan (reigned A.D. 98–117) and Hadrian (reigned 117–138). See infra § 83.

[9] Died after A.D. 244. See infra § 94.

[10] See Cuq, *Institutions juridiques des romains*, vol. ii, p. 1; Leage, *Roman law*, pp. 29–30.

[11] Leage, *Roman law*, p. 29.

[12] See Cuq, *Institutions juridiques des romains*, vol. ii, p. 1; Leage, *Roman law*, pp. 29–30.

[13] The year is stated variably: A.D. 212, — Krueger, *Quellen*, p. 16; A.D. 211–17, — Smith, *Dict. of Greek and Roman antiq.*[3], vol. i, p. 450; A.D. 212–17, — Muirhead, *Roman law*[2], p. 318.

[14] See Bry, *L'édit de Caracalla de 212 d'après le papyrus 40 de Giessen* (in *Études d'histoire juridique off. à P. F. Girard*, vol. i, pp. 1–42, Paris, 1913).

[15] "In orbe Romano qui sunt, ex constitutione imperatoris Antonini cives Romani effecti sunt": *Dig.* 1, 5, 17. See infra vol. ii, § 443.

[16] The *Latina libertas* of the *Juniani* and the *peregrina libertas* of the *dediticii:* see Sohm (Ledlie[3]), *Roman law*, pp. 175, 170. These were of little importance during the Later Empire.

abolished by Justinian. Caracalla's Edict wiped out the old Republican distinction between Roman citizens and Roman subjects, and set up a new Imperial citizenship. Local citizenship and a local private law became replaced by universal citizenship and a universal private law. *The jus civile became the jus vetus.*[17] Only actual foreigners—persons not subjects at all of the Roman Empire — and Romans who had forfeited citizenship were restricted to the old ante-Caracalla separate law for foreigners.[18]

§ 59 **The four forces which transformed Roman law into a world law.** During the Empire four forces were at work converting Roman law from a local into a world law. These were: the praetorian Edict, Greek philosophy especially Stoicism, influence of the jurisconsults, and Imperial legislation. The first three operated during the Early Empire; the last during the Later Empire accomplished the supreme task of codifying Roman law.

(1) The Praetorian Edict and Other Edictal Law

§ 60 **Definition and scope of Edicts.** The Roman praetor, unlike the judge of modern times, was not subject to the law: he was superior to it. When in 367 B.C. the consuls were deprived of their judicial functions,[19] they lost the sovereign, almost unlimited judicial authority which they had inherited from the Kings: this fell upon the praetors.

The *edicta* were orders promulgated by the praetor. At first probably each case was decided on its merits, and it was rarely that the praetor promulgated any orders as to the granting of legal assistance. It soon became the practice, however, "to post up in the praetor's court a list of legal formulae or processes for the better information of parties to an action."[20] Gradually other tablets came into use, — the orders of the praetor as to matters of law, or *real edicts*. These praetorian tablets intended to last for a year only were made of wood and painted white, hence their name *album*.

[17] See Stephenson, *History of Roman law*, p 291.

[18] *Dig* 48, 19, 17, 1.

[19] By the *lex Licinia*.

[20] Sohm (Ledlie), *Roman law*, § 15, p 75

In course of time, each new praetor, upon entering office, (§ 60) became obliged by law to publish his Edict.[21] The quickest way to do this was to revise the album or tablets of Edicts of his predecessor and put up new ones. This annually published Edict finally became known as the *edictum perpetuum* because of its relatively 'permanent' character. It soon became the practice to repeat much of the Edict of the preceding praetor, which portion repeated came to receive the appropriate special name of *edictum translatitium*. Down to 67 B.C. the magistrate issuing the annual edict might disregard it at will during his term of office, but at that time it was made illegal for a praetor to depart from his published Edict.[22] Edictal orders issued during a praetor's term of office, as to matters not covered by the annually published edictum perpetuum, were known as *edicta repentina* or 'occasional' Edicts.

Notice what a convenient instrument the Edict was for giving new principles a trial, for the Edict lasted but a year and then the innovation could be dropped. The way the Edict worked out equitable law was: not by far-reaching generalizations, but by laying down rules for a particular case clearly understood. A second concrete case would be added to the first, for the praetors hesitated to strike out anything which had once found its way into the Edict. Hence the Edict became on its face a collection of rules as to the granting of actions, rules as to pleadings, etc., the phraseology of which was not very pleasant reading. But it was a channel for the transmission of the wisdom and experience of former ages.

The work of the praetorian law was concretely exhibited along three lines: first to give complete effect to the jus civile, next to supplement it, third — and boldest task of all — to reform it. The following is an illustration of the work of the praetors in *reforming the jus civile*. One person obtains something from another by means of threats or fraud. The jus civile generally treated the act as valid, irrespective of the threats or fraud. But the praetor gave the aggrieved

[21] "Ut scirent cives, quod jus de quaque re quisque dicturus esset": *Dig.* 1, 2, 2, § 10.

[22] By a *lex Cornelia:* see Sohm (Ledlie[3]), *Roman law*, p. 77.

party either a right of action or a right of defense. The view of the *jus civile* is opposed to that of the jus honorarium. Now the praetor did not openly abolish the jus civile; its theoretical legal force remained untouched; but practically it was thus thoroughly reformed by remedial relief.

§61 **Edicts compiled by Julian and made perpetual by the Emperor Hadrian in A.D. 131.** With the advent of the Empire, the office of praetor was gradually shorn of its power. The praetorian Edicts became stereotyped and barren, for any change sought to be made in it by the praetors could be nullified by an edict or decree of the Emperor. In the reign of Hadrian the regular reissue of the praetor's Edict had become a mere matter of form. The development of the praetor's Edict really reached its climax under the Republic.

By instructions from Hadrian, the famous jurisconsult Julian[23] revised the Edicts, and made them forever perpetual. Julian also defined the relation existing between the Imperial power and the edict. He revised both the Edict of the praetor urbanus for citizens, and the Edict of the praetor peregrinus for foreigners and subjects, and added to his labor portions of the Edict of the curule aediles. The whole was then ratified by a senatusconsultum of the year 131[24] and forbidden to be thereafter changed.[25] By this statute[26] magistrates were compelled to issue the Edict as arranged by Julian.[27] Thereafter the Emperors decided ambiguities, and added supplements to be found in the Imperial statutes. *The legislation of the Emperors became the jus novum.*[28]

Julian's revision and compilation of the edictal law is known as the **Edictum Hadrianum** or **Julianum.** It foreshadowed

[23] See infra § 89.

[24] See Krueger, *Geschichte d. Quellen d. rom. Rechts*, p. 86.

[25] For text of the Edicts see Bruns, *Fontes Juris*[6], pp. 202–37, and infra vol. iii, § 946.

[26] This SC. did not apply to the whole Empire, hence the contents of the Edict were not applicable to Roman *subjects*. It did not convert the jus honorarium into jus civile. See Krueger, *G. d. Quellen d. rom. Rechts*, p. 91, Sohm (Ledlie[3]), *Roman law*, §17, p. 86, note 4.

[27] *Id.*

[28] See Stephenson, *History of Roman law*, pp. 291 et seq.

the codification of Roman law which occurred during the Later Empire, and it was of much service to Justinian's codifying commission.[29]

(2) Greek Philosophy, Especially Stoicism

An external, not an internal, force. So far we have noticed the influence of internal forces on the development of Roman law into a world law. But the incomparable unity of form and subject-matter of the Roman law was not due solely to the existence of certain judicial officers or even to the Emperor himself. Although the Emperor was head of the State and supreme lawgiver, yet the unity caused by his political position was by itself merely formal and artificial. There were two external forces which powerfully affected for good results the progress of the Roman law: Greek philosophy, particularly Stoicism, which influence was effective during the Early Empire; and Christianity, the influence of which operated during the Later Empire. § 62

Debt of Roman law to Greek culture and philosophy. In a public classroom of the University of Edinburgh, Scotland, there is one embellishment, — a statue of Socrates under which are inscribed these words of Lord Mansfield: "I will take the liberty of calling him the great lawyer of antiquity, since the first principles of all law are derived from his philosophy."[30] While Socrates' philosophy may be regarded as indirectly influencing the Civil Law of Rome, it is certain that "the influence of his successor Zeno made a deep impression upon later Roman jurisprudence. Indeed . . . to Stoicism rather than to Christianity . . . must be attributed that ameliorating influence which manifests itself in the history of Roman law. The doctrine of the *jus naturale* — a doctrine which Stoicism made peculiarly its own — as it became gradually incorporated with the *jus civile*, was one of the main features in the amelioration of the latter, and only in so far as Stoicism was influenced by Christianity (e.g., the § 63

[29] See infra § 137.

[30] Gibson, *Influence of Christianity on Roman law*, 31 Law Mag. and Review, p. 385, (Aug. 1906).

effect upon Seneca by his contemporary St. Paul) can Christianity, in its early years, be said to have any influence on Roman law."[31] Or, as Professor Muirhead says, "The teaching of Seneca did quite as much, nay, far more, to influence it than the lessons that were taught in the little assemblies of the early Christian converts."[32]

Under the Republic the praetorian law as well as the jus civile had grown up and was tinkered for improvement through empirical and administrative methods, — through procedure. But the law of the Empire is characterized by the *belief that law is founded upon ethics*. After the conquest of Greece in 146 B.C. Roman thought began to be influenced by Greek culture and philosophy. The Stoic philosophy in particular appealed to the more intelligent Romans of the Later Republic. Cicero accepted the tenets of this philosophy. And from Cicero to Alexander Severus the ethical principles of Stoic philosophy played a prominent part in Roman education and culture. The Roman mind took naturally to the dignity, righteous simplicity, and austerity of Stoicism. Stoic philosophy finally ascended the throne in the person of Marcus Aurelius, perhaps its greatest philosophical exponent.

§ 64 **The exact point of contact between Stoic philosophy and Roman law was the Stoic theory of the Law of Nature.** Says Sir Henry Maine: "To live according to *nature* was to resist passion and to rise above the disorderly habits and gross indulgences of the vulgar to higher laws of action which nothing but self-denial and self-command would enable the aspirant to observe. It is notorious that this proposition — live according to nature — was the sum of the tenets of the famous Stoic philosophy. The alliance of the Roman lawyers with the Stoic philosophy lasted many centuries . . . The strength of Stoicism on Roman jurisprudence resided . . . in the single fundamental assumption lent to it. After *nature* had become a household word in the mouths of the Romans, the belief gradually prevailed among Roman lawyers that the old Jus Gentium was in fact the lost code

[31] Gibson, *Influence of Christianity on Roman law*, 31 Law. Mag. and Review, pp. 385, 386.

[32] Muirhead, *Roman Law*[2], p. 355.

of nature and that the praetor in framing an Edictal jurisprudence on the principles of the Jus Gentium was gradually restoring a type from which law had only departed to deteriorate."[33]

Consequently the Roman jurists gave the name of *jus naturale* — natural law, law of nature — to describe the natural or ethical foundation on which the civil law must rest. Stoicism declared that the world was possessed by an all-pervading soul, which could be regarded from two different points of view, as a *universal force* or a *universal reason*. This soul is revealed both in the external law of nature and the original nature of man. *Man participates in the universal reason.* Hence the law of nature is the highest rule of human conduct; the great duty of man is to discover and conform to the highest law of reason. Before Cicero it was thought law was founded in custom or convention; after Cicero, the first Stoic, it is regarded as being founded in the very nature of things. "There is," says Cicero, "a true law, a right reason conformable to justice, diffused through all hearts, unchangeable, eternal, which by its commands summons to duty, by its prohibitions deters from evil. Attempts to amend this law are impious, to modify it is wrong, to repeal it is impossible."[34]

§ 65 **The "natural law" entered into and liberalized the Roman jus gentium. Rise of the conception of Equity.** The Greek doctrine of the law of nature first entered Roman law via that branch known as the jus gentium, and strongly affected its progress for the better. The praetors had collected some laws common to all nations. The very fact that they were common to all nations would seem to show that they were derived from universal rational principles inherent in the very nature of things: hence they are the remains of the primitive law established for all men by the universal reason. The jus gentium soon acquired a philosophical significance: it was then regarded as a body of principles founded on the law of nature. It had become a part of the praetor's edict and was definitely sanctioned. Being broader and more liberal than the jus civile it was early called the *jus aequum*, *equitas* or

[33] Maine, *Ancient law* 3d. Am. edition, ch. iii, pp. 52–4.

[34] Cicero, *De republica*, iii, 23; *De legibus* i, 6, ii, 4; Gibson, *Id.* p. 390.

equity. The characteristics of the speculative Roman jus naturale are: "its potential universal applicability to all men, among all people, and in all ages, and its correspondence with the innate conviction of right." And its leading propositions are: "the recognition of the claims of blood, the duty of faithfulness to engagements, the apportionment of advantage and disadvantage, gain and loss, according to the standard of equity and the supremacy of *voluntatis ratio* over words and forms."[35] The aim of the Roman jurists now became this: to bring the Civil law into harmony with natural justice, — that is with what is ethically right. Such was finally the lofty standard of Roman jurisprudence.

The jus gentium thus became thoroughly identified with the jus naturale, — based on the universal principles of right and justice.[36] What shall serve as a moral standard by which the existing positive law shall be justified or its defects exposed or corrected? *Equity*, — the moral code of nature. "Equity will suggest this interpretation, although the law is deficient," says the Imperial jurist Paulus, in interpreting a provision of the praetor's Edict. "The contribution of the Stoics to legal studies consisted more in the informing spirit than in any definite conceptions which were borrowed. . . . Directly as private law was conceived of as a system to be developed by a process of reasoning working on fundamental principles of justice and common sense, and not consisting merely of ancient customs and ceremonies, or of rules arbitrarily imposed by authority, a true concept of law had been reached . . . this is indisputably the true conception of *lex naturae*, law of nature. To conceive of law in this way was the achievement of Rome."[37]

§ 66 **Survival to modern times of the doctrine of "natural law."** The Roman theory of natural law and its universal applicability has survived to modern times and in great vigor. The so-called "natural law" or "natural philosophers" of the 18th

[35] Muirhead, *Roman law*[2], pp. 281–2.

[36] See *Inst.* 1, 2, 11. Savigny (*System*, vol. i, Appendix), declares that the jus gentium and jus naturale were at last really the same. Von Holtzendorf (*Encycl.*[5] p. 121) notices the same fusion.

[37] Lefroy, *Rome and to-day*, 20 Harv. Law Review, pp. 614, 617.

century, such as Rousseau, Montesquieu, repeat the tenets of the Greek philosophers, especially the Stoics. All the familiar phrases of the "natural rights of man to life, liberty, and the pursuit of happiness" and many other expressions cherished by the modern world as embodying eternal principles of justice merely repeat the phrases of the Roman law as furnished by philosophy. Our wonderful Declaration of Independence — a monument to 18th century philosophy — enshrines many a tenet of Roman jurists who confessed the alliance of philosophy with law. "By natural law all men are equal," is the famous statement of the great Ulpian.[38]

§ 67 **Ethical completion and maturity of Roman law attained during the Early Empire.** From Augustus to Diocletian Roman scientific jurisprudence was fully developed and just before Diocletian's reign attained its final maturity. The formative period of Roman law closed with the jurist Papinian. The jus gentium with its tenets of "natural" law and justice had now triumphed over the jus civile. Roman law became truly a world law, — suited for the wants of all mankind. After the accession of Diocletian, the development of Roman law practically ceased; it was then merely summed up by men of genius and crystallized in the form of codification.

How came Roman law to reach "its commanding position as the most magnificent system of jurisprudence ever given to the world"?[39] Why does it to-day form the basis of all the systems of law of the modern civilized world? Because such Roman jurists as Papinian, Paulus, and Ulpian "evolved and applied principles which are applicable for all time, and amid the most various conditions of mankind. Philosophers in the sphere of law, searchers after ultimate truth, they were able at the same time to apply in the concrete what they had found and to give it the force of law."[40] "That which is always equitable and good is called law: such is the natural law," says the jurist Paulus.[41] Notice to what high dignity Ulpian

[38] *Dig.* 50, 17, 32. See also *Inst.* 1, 2, 2: "Jure enim naturali ab initio omnes homines liberi nascebantur."

[39] Gibson, *Id.* p. 391.

[40] *Id.*

[41] *Dig.* 1, 1, 11.

considered the lawyer was called. "They call us priests of justice," he says, "for we cultivate justice and profess a knowledge of goodness and equity, — separating what is lawful from what is unlawful, the right from the wrong; a true philosophy, if I mistake not, and not a sham."[42] While another of his sayings approaches the high ideal of the Sermon on the Mount. Says Ulpian: "The precepts of the law are these: to live uprightly, not to hurt a neighbor, and to render to everyone his own.[43]

(3) Influence of the Jurisconsults

A. The jus respondendi and responsa prudentium[44]

§ 68 **Augustus licensed jurisconsults to give responsa, or opinions on questions of law, binding the courts.** Roman jurisprudence dates, as we have seen,[45] from the pontifices or priests, the learned class of early Rome. Pontifical jurisprudence having ceased to be the authoritative monopoly of the priests, subsequently legal learning became widespread during the Republic, and private persons other than priests freely gave *responsa* or legal opinions. These secular persons were known as lawyers (**jurisconsulti, jureconsulti, jurisperiti, jurisprudentes**). Their responsa were devoid of any authority. But with the advent of Augustus a remedy was devised whereby authority should be restored to professional legal opinions. Augustus did not, however, return this monopoly to the pontifices, but he authorized certain able jurisconsults to make *responsa*, which decisions he sanctioned by his authority. In other words Augustus licensed certain lawyers to render legal opinions citable as authority in court and binding upon judges. This new privilege granted to favored lawyers was called **jus respondendi.** And "jurisconsult" now began to mean the privileged class of Roman lawyers possessing the jus respondendi. The opinion of such a licensed jurisconsult was required to be delivered in writing

[42] *Dig* 1, 1, 1.

[43] *Dig.* 1, 1, 10.

[44] Or *Responsa prudentum* see Hunter, *Roman law*[4], p. 76. "Prudentium" is preferable.

[45] See supra § 45.

and sealed, and when so submitted the judge was bound to decide accordingly, unless a conflicting opinion of another licensed jurisconsult was submitted.[46] Professor Muirhead[47] uses the English expression "patented counsel" to describe Roman jurists having the jus respondendi, while Professor Walton[48] employs the rather slight analogy of the British King's Counsel.

The famous **Sabinus**[49] was the first jurisconsult to obtain from Augustus this license of jus respondendi.[50] The successors of Augustus during the next two centuries continued his policy of licensing certain jurisconsults to exercise the *jus respondendi*. Soon the same authority was extended to previous opinions, which no longer existed, written and sealed as required by law, but only to be found in the literature of the responsa. Hence their force became extended to legal literature, which is converted into a source of law. At the close of the 3d century A.D. exercise of the jus respondendi by Roman lawyers had become very rare and had practically ceased; the last recorded holder of this privilege was **Innocentius,** who received his authorization probably from the Emperor Diocletian.[51] The Emperors alone gave responsa in the form of rescripts.

B CONVERTING ROMAN LAW INTO A SCIENTIFIC JURISPRUDENCE

By assisting the Emperors in legislation. Roman lawyers had during the Early Empire a great share in the government of the Empire. Often the Emperor had been the pupil of some law teacher.[52] It was the custom of the Emperors to consult the leading lawyers of the Empire as well as the immediate § 69

[46] See Hunter, *Roman law*[4], p. 76.

[47] *Roman law*, pp. 291–3.

[48] *Roman law*, p. 135

[49] Masurius Sabinus, — see infra § 103.

[50] *Dig.* 1, 2, 2, 48-50.

[51] See Classon, *Étude sur Gaius*, p. 102; Buckland, *Equity in Roman law*, p. 134. It may be that Constantine authorized Innocentius to act, although this seems doubtful.

[52] E g. Septimius Severus was the pupil of the famous Scaevola,— see infra § 105.

Imperial Council in framing laws or developing constitutional principles. All these opportunities gave Imperial Roman lawyers chances to put into practical operation the philosophic spirit of their age as they assisted in drafting Imperial legislation. The following are instances:

1. Slaves. To inflict unnatural cruelty upon — and finally to kill — a slave was prohibited by Augustus, Claudius, and Antoninus Pius. Moreover, because by natural law all men were born free and equal,[53] the Emperor often restored to slaves the status of a freeborn person.

2. Children and parents. Trajan punished cruelty to a son by emancipation. Proprietary rights were given by the Emperors to children under paternal power.

3. Citizenship. The Emperors finally put all citizens and free subjects on a level of equality. The legislation of Caracalla is an instance of this.

§ 70 **Through the jus respondendi.** Under the Early Empire much Greek philosophy was converted into legal principles by that privileged class of Roman lawyers possessing the jus respondendi[54] or the right to give opinions on questions of law which could be cited in courts as authoritatively binding the judge. By virtue of this privilege, jurisconsults of ability indirectly legislated the philosophical spirit into Roman law by infusing opinions or decisions rendered with liberal ideas of justice. Any questions might be discussed in these opinions of these intellectual leaders of the Bar, which when once given bound also the Roman Bench.

§ 71 **Through legal literature.** Another indirect instrumentality was legal literature or the writings of the jurists. The philosophical theories of Greece did not exist in the Roman mind as mere speculative theories: these were put into actual concrete practice by the Roman legal writers of the Empire. What were their methods? (1) To emphasize general principles in dealing with specific cases: thus declaring that a right depends upon something more ultimate than custom or statute. (2) To distinguish properly between law and morality:

[53] See *Dig.* 50, 17, 32.

[54] See supra § 68.

namely, that although law fundamentally rests on morality, no moral duty is transformed into a legal duty except by the express or tacit sanction of some public authority.

Through definitions and maxims. The scientific spirit of the Roman jurists is seen, furthermore, in their definitions[55] and maxims[56]: their definitions are made so as to afford a safe passage between the Scylla of looseness of language and the Charybdis of technical rigidity; their maxims are regarded as self-evident truths, and form the highest ethical conceptions of Roman law, — such as Pomponius' maxim "It is just by the law of nature that no one should be enriched through another's disadvantage or injury."[57] §72

Again, did the letter and spirit of positive law conflict? "Follow the spirit," says Julian[58]; "Adopt an application of a rule which is not harsh," says Modestinus[59]; "Verbal quibbling is not apprehension of the law," says Celsus.[60] Is there an ambiguity? "Follow the beneficial interpretation," says Marcellus.[61] "Construe law as a whole, and each part thereof with reference to all other parts," says Celsus.[62]

Through methods of interpretation. The Roman jurists developed scientific methods of interpretation. Suppose the existing law were too broad or too narrow and so deficient for the case in hand? If too broad, Julian says, "Interpret it by deduction to meet the case so as to regard such case as coming under its general provision."[63] This is *restrictive* interpretation. "If too narrow, then extend some law, the letter of which does not comprehend the case in hand," the same jurist Julian declares.[64] This is *extensive* interpretation. §73

[55] See especially *Dig.* 50, 16 *De verborum significatione.*

[56] See especially *Dig.* 50, 17 *De diversis regulis*, etc.

[57] *Dig.* 50, 17, 206.

[58] *Dig.* 1, 3, 15.

[59] *Dig.* 1, 3, 25.

[60] *Dig.* 1, 3, 17.

[61] *Dig.* 50, 17, 192.

[62] *Dig.* 1, 3, 24.

[63] See *Dig.* 1, 3, 10 and 11.

[64] See *Dig* 1, 3, 12 and also *Dig.* 1, 3, 13 (Ulpian).

C. THE TWO SCHOOLS OF IMPERIAL ROMAN JURISTS SABINIAN AND PROCULIAN

§74 **The lawyers of the Early Empire divided into two opposing parties. Rise of the two great Roman law schools of the Sabinians and Proculians.** Beginning in the lifetime of Augustus and continuing for about two centuries as late as the reign of Marcus Aurelius,[65] the lawyers of the Early Empire were divided into two "opposing parties"[66] or schools: the Sabinians and Proculians. These schools were originally founded by the famous jurists **Capito**[67] and **Labeo.**[68] From Capito's eminent disciple **Sabinus,**[69] the first lawyer licensed to exercise the jus respondendi, the Sabinians derived their name; from Labeo's distinguished disciple **Proculus**[70] the Proculians received their name. The **Sabinians** were sometimes called **Cassians,** from Cassius Longinus,[71] a disciple of Sabinus, while the **Proculians** infrequently were called **Pegasians** from Pegasus,[72] a disciple of Proculus. The essential differences between the Sabinian and Proculian schools of jurists cannot now be determined. Originally the Sabinians seem to have been more devoted to the jus civile, while the Proculians gave more attention to the praetorian law.[73] But the Proculians were inclined to abide by traditional rules and methods — to prefer the letter of the law to its spirit — while the Sabinians preached progress for Roman law and tried to get rid of its then old-fashioned formalism and rigidity.[74]

These two schools were also something far more than opposing camps into which Roman lawyers were divided; they

[65] Reigned A.D. 161–180. See Clark, *Roman private law: sources*, p. 128.

[66] Roby, *Introduction to the Digest*, p. cxxvii.

[67] See infra § 80.

[68] See infra § 90.

[69] See infra § 103.

[70] See infra § 103. Proculus was the second in succession to Labeo, Nerva (infra § 96) being Labeo's immediate successor.

[71] See infra § 81.

[72] See infra § 100.

[73] See *Dig.* 1, 2, 2, 47.

[74] The best account of the actual controversies of these two schools is by Roby, *Introduction to Roman law*, pp. cxxx–cxli.

became societies organized to impart legal instruction — in other words, *law schools*.[75] The opposition of these schools was somewhat like the vague rivalry of modern universities, such as that between Oxford and Cambridge, Yale and Harvard.[76] Much of the divergence of these two great Roman schools was due to the personnel of the teachers. (§74)

The first Roman jurist to originate a real law school was Sabinus,[77] who seems to have adopted the mode of giving instruction through a corporate organization which had been prevalent among Greek schools of philosophy. These were societies of which the students were the members and the professor[78] was the president. Each student upon entering paid a fee for tuition. Certainly Sabinus was in the habit of taking fees from his pupils, — according to the jurist Pomponius, Sabinus supported himself by giving legal instruction.[79] The jurist Ulpian also speaks of the fee payable to the professor.[80] The other school, the Proculians, became organized in the same way. One professor used to succeed another as president[81] by legal succession. Pomponius always uses[82] the word *succedit* in enumerating the presidents of the Sabinians and Proculians, — a term avoided in enumerating the jurists of the Republic.

From Augustus to Hadrian the heads of these two schools were[83]: **of the Sabinians,** — Capito, Masurius Sabinus, Cassius Longinus, Caelius Sabinus, Javolenus, Valens and Tuscianus and Julian; **of the Proculians,** — Labeo, Nerva, Proculus and Nerva *filius*, Pegasus, Celsus *pater*, Celsus *filius*,

[75] As to Roman law schools and legal education in detail, see infra §§ 154 et seq.

[76] Walton, *Roman law*, p. 138.

[77] See infra § 103.

[78] *Magister*, *antecessor*, or *professor*.

[79] *Dig.* 1, 2, 2, 50: "Huic nec amplae facultates fuerunt, sed plurimum a suis auditoribus sustenatus est."

[80] *Dig.* 50, 13, 1, 5.

[81] Sometimes the presidency was divided between two or more, all of whom were full presidents.

[82] See *Dig.* 1, 2, 2, 51.

[83] See *Dig.* 1, 2, 2; Clark, *Roman law: sources*, pp. 107–29; Roby, *Introduction to Roman law*, p. cxxvii.

and Neratius Priscus. The jurist Gaius[84] mentions contemporary teachers of the Proculians, but their names have not come down to us. The organized opposition of the two schools or societies lasted down into the reign of Hadrian,[85] when owing to the reputation and influence of the then head of the Sabinians, the illustrious Julian, the Proculians gradually died out and all became Sabinian.[86]

Early in the 2d century A.D. attempts began to be made to reconcile the views of the two schools of the jurists: this is the first indication that a true spirit of *scientific jurisprudence* was affecting the welfare of Roman law. These attempts finally resulted in a fusion of both the jus civile and the jus honorarium, now stationary, with the new Imperial statutory law into one harmonious whole.

D. FAMOUS JURISTS OF THE EARLY EMPIRE

§ 75 **The greatest Imperial jurists.** Some sixty distinguished jurists[87] of the Early Empire survived their own age, and are recorded in Justinian's Digest,[88] which was compiled[89] about three centuries later than the last great Imperial jurist[90] and

[84] Died after A.D. 180.

[85] Reigned A.D. 117–138. See Clark, *Roman private law: sources*, pp. 119, 128.

[86] Karlowa, *Rom. Rechtsgeschichte*, i, p. 709.

[87] Roby records sixty-eight jurists. For their names and biography, see Roby, *Introduction to Roman law*, pp. cxxiv–ccviii; and Clark, *Roman private law: sources*, pp. 107–44. For a restoration of the texts of their works compiled from extant sources, particularly Justinian's Digest or Pandects, see Lenel, *Palingenesia juris civilis*, 2 vols. Leipzig, 1889.

[88] In Const. *Tanta*, §§ 17 and 20, Justinian gives an account of the work of making the Digest, stating that a very large number of books were collected, being furnished principally by Tribonian, chairman of the Digest commission, and those from which extracts were made are stated to have been set down in a list prefixed to the Digest. In the Florentine MS. of the Digest (the oldest MS. in existence) there is preserved such a list — now called the *Florentine Index* — which contains the names of 38 jurists and 207 treatises in 1544 volumes, — see Roby, *Introduction to the Digest*, p. xxiv. This list of jurists is not complete: it omits those furnishing no materials for the Digest.

[89] It was promulgated Dec. 16, A.D. 533.

[90] Modestinus, the latest authentic date in whose life is A.D. 244: Clark, *Roman private law: sources*, p. 138.

over 550 years after Augustus established the Empire. The (§75)
greatest Roman jurist was **Papinian,** whose brilliancy has never been dimmed by any modern rival. Modern criticism endorses Justinian's praise of his genius as "sublimely great, profound, keen, lucid, and brilliant."[91]

In the 5th century, about 200 years after the last jurist of eminence,[92] the Romans thus ranked their great jurists; first Papinian, then these four: **Paulus, Gaius, Ulpian,** and **Modestinus.**[93] But this selection is defective because it ignored all the jurists save the four latest holders of the jus respondendi and Gaius. It should be enlarged to include the following eleven earlier jurists, all of whom were eminent — some of them pre-eminent for their legal genius and attainments: Labeo, Sabinus,[94] Nerva, Cassius, Proculus, Javolenus, Celsus,[95] Julian, Pomponius, Marcellus, and Scaevola.

The renowned jurist Ulpian is the largest contributor to Justinianean Roman law,[96] the next being Paulus,[97] Papinian, Pomponius, Gaius, Julian, Modestinus, and Scaevola,— in the order named.[98] Largely through the writings of Ulpian and Paulus have the labors of the Imperial jurists operated on subsequent ages. More than one-third of Justinian's monumental Digest is made up of Ulpian's works,[99] which form its groundwork. More than one-sixth of the Digest is derived

[91] See Const. *Deo auctore,* § 6; Const. *Omnem,* §§ 1, 4.

[92] Modestinus (died after A.D. 244), see infra § 94.

[93] This is the Roman order of appreciation as set forth in the famous statute known as the Valentinian "Law of the Citations," A.D. 426, whereby the Imperial sanction was given to the writings of Papinian and the four jurists above mentioned as authorities for the then Roman law. See *Cod. Theod.,* 1, 4, 3.

[94] *Masurius* Sabinus.

[95] Celsus *filius.*

[96] For this reason Clark, *Roman private law: sources,* p. 136, calls Ulpian "the greatest Jurist."

[97] He was the most prolific writer of Roman literature: see Roby, *Introduction to the Digest,* p. cci.

[98] Roby, *Introduction to Digest,* ch. x–xv. In the Digest of Justinian are 2464 extracts from Ulpian, 2081 from Paulus, 601 from Papinian, 578 from Pomponius, 535 from Gaius, 456 from Julian, 344 from Modestinus, and 306 from Scaevola. See infra §§ 108, 99, 98, 101, 86, 89, 94, 105.

[99] Roby, *Introduction to the Digest,* p. cxcix.

from the works of Paulus.[100] Both Ulpian and Paulus have contributed over one-half of Justinian's Digest.

§ 76 **Specific contributions of Imperial jurists to Roman law.** From the time of Hadrian to Alexander Severus[101] was the greatest activity of the Imperial jurists in contributing to Roman legal literature. Distinguished jurisconsults and teachers early wrote institutional or **elementary treatises** for the use of law students. Roman elementary treatises were of many varieties. Gaius,[102] Ulpian, Marcian, Callistratus, and Florentinus published *Institutes*[103]; Neratius, Scaevola, Ulpian, and Modestinus published *Regulae;* Paulus was the author of three elementary works[104]; Pomponius published an *Enchiridion* (Handbook); Hermogenian an *Epitome;* Papinian wrote a famous work known as *Definitiones*[105]; and Modestinus was the author of a treatise entitled *Differentiae.*

Various jurists published **case-books** of Roman law. Marcellus, Scaevola, Papinian, Paulus, Ulpian, and Modestinus published *Responsa*, which are the principal works of the case literature. But Gaius' book *De casibus*, the *Epistulae* of Javolenus and Pomponius, and the *Decreta* of Paulus belong to the literature of the cases.

The **dogmatic and exegetical treatises** of the Early Imperial jurists were many and of the highest excellence. The most important dogmatic works were: Sabinus' work on the *Jus civile;* the works of Pomponius, Gaius, Ulpian, and Paulus on *Fideicommissa* (Trusts); that of Gaius on verbal obligations; Ulpian's treatise on the office of various magistrates and officials[106]; those of Paul and Callistratus on the law of the *fiscus* (Imperial treasury and revenue); the works on military law by Menander and Macer; and Paulus' works on wills and adultery. The principal exegetical works were: the Commen-

[100] *Id.* p. cciii.

[101] A D. 117–235.

[102] Gaius also published an elementary treatise entitled *Aurea* or *Res cottidianae.*

[103] *Institutiones.*

[104] *Sententiae, Manualia,* and *Brevia.*

[105] Q. Mucius (Scaevola), the Republican jurist (see supra § 53), was the author of a work bearing the same title.

[106] Such as the *proconsul, consul, praefectus urbi*

taries on Sabinus written by various subsequent jurists who wrote whole treatises to discuss texts of ancient writers, — literature somewhat analogous to the work of the English Coke on Littleton; the Commentaries on the Edicts; the treatise of Gaius on the XII Tables, Pomponius on Mucius Scaevola[107]; and the works of Paulus, Marcian, and other writers on specially important Roman statutes, such as the *lex Julia et lex Papia Poppaea*, *lex Falcidia*, *SC. Turpilianum*.

Roman legal literature was also enriched by various important **miscellaneous works.** In the category of discussions belong the *Quaestiones* of Scaevola, Papinian, Africanus, Tertullian, and Paulus; the *Disputationes* of Ulpian and Tryphoninus; and probably the *Publica* of Maecian, Marcian, Venuleius, and Macer.[108] Of great excellence and value are Labeo's celebrated works the *Pithana* and *Libri posteriores;* the *Digesta* of Julian, Celsus, and Marcellus; the *Pandectae* of Ulpian and Modestinus; the *Membranae* of Neratius; and the *Variae lectiones* of Pomponius. The great epoch of Roman legal literature was during the Early Empire. The constructive legal ability, excellence of style, and charm of the Imperial Roman jurists have never been surpassed in subsequent ages. A sketch of each of the principal Roman jurists now follows.

Africanus. Sextus Caecilius Africanus (died before[109] A.D. 169–175) was probably a pupil of the great jurist Julian.[110] Aulus Gellius[111] gives an account of the Law of the XII Tables as discussed by Africanus, — which constitutes a large part of what is now known about that ancient Roman statute. Africanus was the author of *Epistulae* and *Quaestiones*. In the Digest of Justinian are 131 extracts from the latter work.[112] § 77

Aristo. Titius Aristo (died after A.D. 105) is probably the name of this jurist who was a warm friend of Pliny the younger. Aristo was a pupil of Cassius.[113] He was the author of notes § 78

[107] The Republican, not the Imperial, Scaevola: see supra § 53.
[108] Roby, *Introduction to the Digest*, pp. lxxxvii.
[109] Clark, *Roman private law: sources*, p. 120.
[110] See infra § 89.
[111] xx, 1.
[112] Roby, *Introduction to the Digest*, p. clxx.
[113] See infra § 81.

on some of the works of Labeo, Sabinus, and Cassius. Aristo was a member of the Council of Trajan. In the Digest of Justinian Aristo is referred to eighty times.[114]

§ 79 **Callistratus.** This 3d century jurist (died after[115] A.D. 211) was probably a Greek. He wrote these important works: *De cognitionibus*, *Edictum monitorium*, *De jure fisci*, *Institutiones*, and *Quaestiones*. In the Digest of Justinian there are 101 extracts from Callistratus.[116] The following passages are from Callistratus' works: "Custom is the best interpreter of the laws.[117] The good faith of witnesses should be diligently examined."[118]

§ 80 **Capito.** Caius Ateius Capito (consul suffectus[119] A.D. 5, died A.D. 22) was the great rival of the jurist Labeo. Capito obsequiously favored the Imperial government, and was preferred by Augustus to the sturdy Republican Labeo. In addition to his consulship, he received the appointment in A.D. 16 of *curator aquarum*[120] (water commissioner of Rome), which office he held until his death. Tacitus the historian calls him a skilled lawyer. Capito wrote the *Conjectanea*, and books on the pontifical law and the senatorial office. He is cited twice[121] in the Digest of Justinian. Capito was the founder of that party of Roman lawyers later known as the Sabinian school.

§ 81 **Cassius.** Caius Cassius Longinus (died c.[122] A.D. 69–79) was the grandson of the famous Republican jurist Tubero and great-grandson of the well-known Republican jurist Sulpicius.[123] Cassius was a member of that family to which

[114] Roby, *Introduction to the Digest*, p. clvi.

[115] See *Dig.* 1, 19, 3, 2, and Clark, *Roman private law: sources*, p. 140, note 220.

[116] Roby, *Introduction to the Digest*, p. cciv.

[117] *Dig.* 1, 3, 37.

[118] *Dig.* 22, 5, 3.

[119] A sort of *vice-consul* available to act as *consul* if the latter died or was disabled.

[120] Frontinus, *Aq.* 102.

[121] *Dig.* 8, 2, 13, 1 and *Dig.* 23, 2, 29.

[122] During the reign of Vespasian: Roby, *Introduction to the Digest*, p. cxlvi.

[123] See supra § 53.

the conspirator against Caesar belonged. Consul[124] in A.D. 30, propraetor of Syria in A.D. 49, he was of stern and dignified character. Falling under the suspicions of Nero, he was banished in A.D. 65 to Sardinia, but was recalled by Vespasian during whose reign he died.

The fame of Cassius as a lawyer was great, so much so that the school headed by Capito and Sabinus was frequently called the Cassian.[125] The subsequent jurists Aristo[126] and Javolenus[127] wrote notes on some of Cassius' works. In the Digest of Justinian there are more than one hundred references to Cassius.[128]

§ 82 **Celsus *pater*.** Juventius Celsus (*c.*[129] A.D. 70–96) was the successor of Pegasus as head of the Proculian school founded by Labeo. If Celsus is mentioned without *pater*, it means his son who was more famous than the father. Celsus *pater* is mentioned a few times in the Digest of Justinian.[130]

§ 83 **Celsus (*filius*).** Of Publius Juventius Celsus Titius Aufidius Oenus Severianus[131] (died after A.D. 129) very little is known. He was a member of the Emperor Hadrian's Council; and consul for the second time in A.D. 129, during which year the important statute SC. Juventianum was enacted, being named after this Juventius Celsus. This Celsus was the son of Celsus *pater*.[132] When the *pater* is not added to Celsus, the son alone is meant. Celsus succeeded his father as head of the Proculian school originally started by Labeo.

Celsus was "a man of sharp temper and vigorous expression."[133] During the Middle Ages the expression *responsum Celsinum* was a proverbial expression for a sharp answer.[134]

[124] *Suffectus*, see supra § 80.

[125] Pliny, *Ep.* vii, 24: Gaius 1, 196; *Vatican Frag.* 1; Ulpian, *Regulae*, 11, 28; *Dig.* 1, 2, 2, 52; *Dig.* 39, 6, 35; *Dig.* 47, 2, 18.

[126] See supra § 78.

[127] See infra § 88.

[128] Roby, *Introduction to the Digest*, p. cxlviii.

[129] Clark, *Roman law: sources*, p. 112.

[130] See *Dig.* 12, 4, 3; *Dig.* 31, 20, 29; *Dig.* 17, 1, 39.

[131] *Id.* 5, 3, 20, 6, gives his full name.

[132] See supra § 82.

[133] Roby, *Introduction to the Digest*, p. clxi.

[134] Roby, *Id.*; Girard, *Mélanges*, vol. i, pp. 1–26 (Responsum Celsinum).

This epithet thus arose: on one occasion Celsus was consulted by a certain Domitius Labeo,—the Digest[135] report (taken from Celsus' own *Digest*) gives an interesting account of the particulars: "Domitius Labeo to Celsus, greeting: 'I ask this question, whether one who has been summoned to write a will, and has written and sealed it, may be counted as one of the witnesses to the will?' Juventius Celsus to Labeo, greeting: 'Either I do not understand why you have consulted me, or your question is extremely foolish; for it is more than ridiculous to doubt whether a man can act as a witness when he himself has written the will.'" And the name of the questioner was also applied in the Middle Ages to proverbially denote a foolish question,—*quaestio Domitiana*.[136]

Celsus was a jurist of the first rank, and his opinions were very highly regarded by subsequent jurists. His style was epigrammatic and elegant. Celsus was the author of several very valuable works: the *Digesta* in thirty-nine books, *Quaestiones*, *Epistulae*, and *Commentarii*. In the Digest of Justinian there are 141 extracts and 176 citations from Celsus.[137]

The following passages from Celsus show his style: "To know the laws is not to apprehend their words, but their force and power.[138] Justice is the art of what is just and right.[139] That which the very nature of things prevents is not to be established by any law.[140] An action is nothing else than a right to obtain in court what is due to a person.[141] There is no obligation as to things which are impossible.[142] The seashore extends as far as the highest tide reaches.[143] A lawful marriage is not contracted against the will of the parties.[144] He is in possession who possesses in the name of another.[145] No indulgence is allowable for fear that is unfounded."[146]

§ 84 **Clemens.** Terentius Clemens (c.[147] A.D. 161) was the author of a famous book on the Leges *Julia et Papia Poppaea*,

[135] *Digest* of Justinian, 28, 1, 27.
[136] Roby, *Id.*; Girard, *Id.*
[137] Roby, *Introduction to the Digest*, pp clxii–clxiii.
[138] *Dig.* 1, 3, 17.
[139] *Dig.* 1, 1, 1, pr.
[140] *Dig.* 50, 17, 188.
[141] *Dig.* 44, 7, 51.
[142] *Dig.* 50, 17, 185.
[143] *Dig.* 50, 16, 96.
[144] *Dig.* 23, 2, 22
[145] *Dig.* 41, 2, 18.
[146] *Dig.* 50, 17, 184.
[147] Clark, *Roman private law: sources*, p. 120.

thirty-five extracts of which are contained in Justinian's Digest. The following is from Clemens: "He is deemed in being, who at the time of the decedent's death was in utero."[148]

Florentinus. The jurist Florentinus (died after[149] A.D. 161) was the author of *Institutiones* in twelve books, from which forty-two extracts have been inserted in the Digest of Justinian, and a few in the Institutes of the same Emperor.[150] The following passages are from Florentinus: "Freedom is the natural right to do as one pleases except as prevented by violence or law.[151] Betrothal is the declaration and mutual promise of a future marriage.[152] The ownership of property deposited with another remains in the depositor."[153] § 85

Gaius. This talented jurist (died after[154] c. A.D. 180) lived in the latter half of the 2d century during the reigns of Hadrian, Antoninus Pius, Marcus Aurelius, and Commodus. Gaius is perhaps the Roman jurist best remembered by moderns.[155] Who Gaius was is not known,—not even his family name is known, for "Gaius" is only a first name or praenomen. It is supposed that Gaius was a Greek. Certain German scholars make the very curious claim that Gaius was really a woman,[156]—but such seems naturally impossible because of Gaius' remarkable legal genius. Gaius undoubtedly was a public teacher and law professor. To Gaius are due the beginnings of Comparative Jurisprudence: he was the first to compare Roman law with that of other nations on specific points of law.[157] § 86

[148] *Dig.* 50, 16, 153.

[149] *Dig.* 41, 1, 16 where he calls the Emperor Antoninus Pius "divus" (deceased). See Clark, *Roman private law: sources*, p. 139.

[150] Roby, *Introduction to the Digest*, pp. ccv–ccvi.

[151] *Dig.* 1, 5, 4.

[152] *Dig.* 23, 1, 1.

[153] *Dig.* 16, 3, 17, 1.

[154] Poste, Gaius[4], p. lv.

[155] On Gaius, see *Great jurists of the world*, pp. 1–16 (vol. ii, *Continental Legal History Series*, Boston, 1914).

[156] Deutsche Juristen-Zeitung, 1 Oct.-15 Dec. 1908. See also *Dig.* 35, 1, 63, 1, "Si verum amamus durior haec condicio est quam *illa* . . . 'si non nubserit'"; Gaius, 1, 144 and 190.

[157] Gaius 1, 193, as to contracts of married women and infants, — with the law of the Bithynians; Gaius 3, 96, as to obligations contracted by

(§ 86) The great fame of Gaius arises from the royal road he made to the study of law when he composed his wonderful and very celebrated *Institutes*,[158] which have served as a model for all subsequent writers of text-books on law, especially elementary treatises, including our own Blackstone and Kent. Gaius' Institutes have never been surpassed in excellence as an elementary law book for students. His work reveals an accomplished teacher, possessed of the power of clear and precise analysis and using no superfluous or poorly chosen words. Gaius hit most successfully the happy medium "between pedantic precision and loose generality of statement."[159] The charm and excellence of his Institutes lived for centuries after his death. Justinian's Institutes are largely a revision of Gaius, made four centuries later. The manuscript of Gaius' Institutes is a modern discovery made by Niebuhr in A.D. 1816 in the library of the Chapter at Verona.[160]

Gaius was a very voluminous writer. He wrote a Commentary on the Provincial Edict in thirty-two books; a Commentary on the Edict of the praetor urbanus; fifteen books *Ad leges* (various statutes); a work *De verborum obligationibus*, a work *De manumissionibus;* a book on Trusts; books on Cases, Rules, Dowry, and Hypothec; his work of Institutes mentioned above; and the *Res cottidianae*, or, as later admirers called it, *Aurea*, which was intended to supplement the Institutes and went more into details for practitioners. In the Digest of Justinian are 535 extracts from Gaius.[161] With Gaius, a Sabinian, the opposition of the Sabinian and Proculian schools — founded by Capito[162] and Labeo[163] respectively — came to an end.

oath, — with the laws of foreign states upon search; Gaius, 1, 55, as to the paternal power, — with the law of the Galatians. Glimmerings of the value of comparative law study are found in Caesar, *De bell. Gall.* i, 55.

[158] *Institutionum juris civilis commentarii quattuor.*

[159] Roby, *Introd. to the Digest*, p. clxxiii.

[160] The text is given in vol. i of *Collectio librorum juris ante-Justiniani* (Krueger, Mommsen, Studemund), Berlin. Among English translations of Gaius' Institutes are those of Poste, Muirhead, and Abdy and Walker. See infra vol. iii, § 948.

[161] Roby, *Introduction to the Digest*, p. clxxxii.

[162] See supra § 80.

[163] See infra § 90.

The following are interesting excerpts from Gaius: "A man's house is his castle.[164] In the whole is also contained a part.[165] Now the law which we use relates either to persons, or to things, or to actions.[166] Actions in personam are not generally available against an heir.[167] Defendants rather than plaintiffs are to be more favorably treated.[168] Always in ambiguities (as to legacies), the more favorable interpretation should be preferred.[169] A creditor who permits the thing pledged to be sold loses his security.[170] Want of skill is equivalent to negligence[171]."

Hermogenian. The 4th century jurist Hermogenianus who lived during the reign of Constantine the Great (A.D. 306–37) is customarily included in the list of the jurists of the Early Empire, for in the Digest of Justinian there are 107 extracts from Hermogenian's works.[172] Hermogenian is probably[173] the same Hermogenian who was the author of the **Hermogenian Code** (Codex Hermogenianus), which is a collection of Imperial statutes compiled in the reign of Constantine the Great. § 87

Hermogenian was the author of *Juris epitomae* and perhaps *Fideicommissa* (the latter, however, is now thought[174] to be a work of the earlier jurist Ulpian[175]). The following extracts from Hermogenian show his style: "The State always has a right of lien.[176] It is useless to make a promise how another person will act.[177] Contumacious persons are those who, when they ought to obey, refuse to do so.[178] Sureties are

[164] *Dig.* 2, 4, 18. See Broom, *Maxims*, p. 321.
[165] *Dig.* 50, 17, 113.
[166] *Dig.* 1, 5, 1.
[167] *Dig.* 50, 17, 111, 1. See Broom, *Maxims*, p. 702.
[168] *Dig.* 50, 17, 125.
[169] *Dig.* 50, 17, 56.
[170] *Dig.* 50, 17, 183. See also, Phillimore, *Maxims*, p. 249.
[171] *Dig* 50, 17, 132 See also Phillimore, *Id.* p 230.
[172] Roby, *Introduction to the Digest*, p. ccviii.
[173] Clark, *Id.* Contra, Roby, *Id.* See infra § 126.
[174] Clark, *Roman private law sources*, p. 143.
[175] See infra § 108.
[176] *Dig.* 49, 14, 46, 3.
[177] *Dig.* 49, 1, 65.
[178] *Dig* 42, 1, 53, § 2.

not liable unless they promise to pay or do something in the future.[179]"

§ 88 **Javolenus.** Of Caius Octavius Tidius Tossianus Javolenus Priscus (consul before A.D. 90) little is known except his very odd name.[180] He received the privilege of *jus respondendi* during Trajan's reign, and in A.D. 106 or 107 was a member of Trajan's Council. Javolenus succeeded Caelius Sabinus[181] as head of the Sabinian school of jurists originally started by Capito.[182] Javolenus wrote a large book of *Epistulae* and Commentaries on works of Labeo,[183] Cassius,[184] and Plautius.[185] In the Digest of Justinian there are 206 extracts of Javolenus' works.[186] The following passages were written by him: "The State cannot lose a public highway by non-user.[187] In all acts of transferring ownership there must be a meeting of the minds of the contracting parties.[188]"

§ 89 **Julian.** Publius Salvius Julianus (died before[189] A.D. 169) held high offices of state including the praetorship, consulship, and city prefect (praefectus urbi). He was also a member of the Emperor Hadrian's Council.[190] He was the grandfather of the unfortunate Emperor Didius Julianus, who succeeded Pertinax in A.D. 193 and was murdered in the same year.[191] The jurist Julian[192] succeeded Javolenus[193] as one of the heads of the Sabinian school originally founded by Capito.[194] So

[179] *Dig.* 46, 1, 65.

[180] Clark, *Roman private law· sources*, p. 114.

[181] See infra § 104.

[182] See supra § 80.

[183] See infra §90.

[184] See supra §81.

[185] Plautius was a jurist of note of about the time of Vespasian (A.D. 69–79) or later in the 1st century.

[186] Roby, *Introduction to the Digest*, p. clx.

[187] *Dig.* 43, 11, 2.

[188] *Dig.* 44, 7, 55.

[189] Clark, *Roman private law· sources*, p. 119.

[190] Hadrian reigned A.D. 117–138.

[191] Spartianus, *Did , Jul* , 1.

[192] An interesting book on him has been written by Buhl, *Salvius Julianus*, Heidelberg, 1886.

[193] See supra §88.

[194] See supra § 80.

great was his ability that the Sabinian school finally triumphed over its ancient rival the Proculian, which finally died out. Ultimately all became Sabinian.[195]

The Emperor Hadrian instructed Julian to revise and arrange the Edicts of the praetors — both the praetor for citizens (*praetor urbanus*) and praetor for foreigners (*praetor peregrinus*) — and parts of the edict of the curule aediles. When Julian had completed this great and difficult task, his work was ratified by a senatusconsultum[196] of the year A.D. 131. Thereafter references to the **Edictum perpetuum** meant Julian's compilation of the Edict.[197] And thereafter the Imperial rescripts performed the legislative function of praetors prior to Julian.

Julian was the author of several works of very great value. His principal work, the *Digesta*, was in ninety books. In the Digest of Justinian there are 456 extracts and 620 citations of Julian's works.[198] The following excerpts show Julian's style: "Whenever a phrase expresses two meanings, that is to be accepted which is the more fitted for accomplishing the act[199] (in question). A person is deemed to have entered into a contract in that place where he has obligated himself to perform.[200] He ceases to be a debtor who has a just defense not inconsistent with natural equity.[201] An inheritance (*hereditas*) is nothing else than an entire succession to a deceased person.[202]"

Labeo. Marcus Antistius Labeo (c. 50 B.C.—A.D. 20) § 90 was a pupil of several prominent jurisconsults of the last half century of the Republic, particularly the famous Trebatius,[203] from whom largely he received his legal training. Labeo was sternly opposed to the Imperial government of Augustus, being Republican in politics. And at times he was not afraid

[195] Karlowa, *Rom. Rechtsgeschichte*, vol. i, p. 709.

[196] Const., *Tanta*, § 18; Const. Δέδωκεν, § 18. See also *Code* 4, 5, 10; *Code*, 6, 61, 5.

[197] See *Dig.* 31, 77, 29; *Code*, 2, 1, 3.

[198] Roby, *Introduction to the Digest*, pp. clxvii–clxviii.

[199] *Dig.* 50, 17, 67.

[200] *Dig.* 43, 7, 21.

[201] *Dig.* 50, 17, 66. See also Phillimore, *Maxims*, p. 214.

[202] *Dig.* 50, 17, 32.

[203] See supra § 53.

(§90) to manifest his animosity to the Imperial rule, so much so that he rejected an offer of Augustus to make him consul,[204] for which Tacitus the historian greatly praises him.[205] Labeo's great rival was the jurist Capito,[206] whom Augustus favored.

Labeo was profoundly versed in Roman legal antiquities, and was a stickler for the old constitution. Being a man of wide culture and trained in philosophy, Labeo's criticism of the Imperial régime undoubtedly operated along scientific as well as practical lines, and indirectly assisted in developing the Imperial law into a consistent whole. Labeo was the founder of that party of Roman lawyers later known as the Proculian school.

Labeo's knowledge of the Roman law of his day was eminently profound. It was Labeo who removed all doubts as to the validity of codicils,[207] in his day an entirely new development of the Roman law of testamentary disposition. The 2d century jurist Pomponius[208] says that Labeo wrote 400 legal treatises, many of which were still useful to lawyers living one hundred years after Labeo.

Labeo's two works, the *Pithana* and *Posteriores libri*, were well-known to subsequent jurists. The *Pithana* (Probabilities) was abridged by the 3d century jurist Paulus,[209] and there are thirty-four extracts of this abridgment of Labeo in the Digest of Justinian.[210] Labeo's *Posteriores libri* were abridged by the 2d century jurist Javolenus[211]; and in the Digest of Justinian there are seventy-four extracts of Labeo abridged.[212] Labeo wrote also works on the law of the Pontifices and on the XII Tables. Labeo is cited 540[213] times in the Digest of Justinian.

[204] *Consul suffectus*, explained, supra §80.
[205] *An* iii, 75.
[206] See supra §80
[207] *Inst.* 2, 25, pr.
[208] See infra §101.
[209] See infra §99.
[210] Roby, *Introduction to the Digest*, p. cxxvi.
[211] See supra §88.
[212] Roby, *Introduction to the Digest*, p cxxvi.
[213] Roby, *Introduction to the Digest*, p cxxvii.

Maecian. Lucius Volusius Maecianus (died[214] A.D. 175) was instructor of law of the Emperor Marcus Aurelius, while heir to the throne, and subsequently became one of his Council. It is quite possible that Maecian was a pupil of the great jurist Julian.[215] Maecian, while governor of Alexandria, was killed in A.D. 175 by the army, because he took part in an insurrection against his Imperial pupil. §91

Maecian was the author of several valuable works: *Fideicommissa*, *Publica*, on the lex Rhodia,[216] and a short elementary treatise addressed to Caesar — probably Marcus Aurelius. In the Digest of Justinian there are forty-four extracts and seventeen citations from Maecian.[217] The following passage is characteristic: "In doubtful expressions the best interpretation is the purpose of the person using them."[218]

Marcellus. Lucius Ulpius Marcellus (died after[219] A.D. 166) was a member of the legal Councils of Antoninus Pius and Marcus Aurelius, and probably Imperial legate pro praetore in Lower Pannonia. Some authorities identify him also with that Ulpius Marcellus sent by the Emperor Commodus to Britain on a military expedition against the Britons, and who was so successful that he just escaped being put to death in A.D. 184 by that Emperor.[220] §92

Marcellus wrote notes on the jurists Julian[221] and Pomponius.[222] Marcellus was the author also of *Digesta* in thirty-one books, a work *Ad leges*, and a book of *Responsa*. The 3d century jurist Ulpian[223] wrote notes on Marcellus' writings. In the Digest of Justinian there are 161 extracts from Marcellus.[224] The following passages from Marcellus are interesting: "An heir does not inherit a criminal action against the

[214] Capitolinus, *Vita M. Ant.*, 25.
[215] *Dig.* 34, 2, 30, 7.
[216] See *Dig.* 14, 2, 9.
[217] Roby, *Introduction to the Digest*, p. clxxiii.
[218] *Dig* 50, 17, 96. See Phillimore, *Maxims*, p. 296.
[219] Clark, *Roman private law: sources*, p. 123.
[220] Dio Cassius, lxxii, 8.
[221] See supra §89.
[222] See infra §101.
[223] See infra §108.
[224] Roby, *Introduction to the Digest*, p. clxxxv.

deceased[225] (ancestor). A gift mortis causa takes effect immediately.[226] When equity clearly is demanded relief must be furnished.[227] In a doubtful matter it is more just as well as safe to follow the more favorable interpretation.[228]"

§ 93 **Marcian.** Aelius Marcianus (died after[229] A.D. 217) was a jurist of great ability. He wrote several important works: *De appellationibus* (on Appeals); on Rules; on *Publica* (Criminal Procedure); *De delatoribus* (on Informers); on Hypothec; notes on the jurist Papinian's[230] *De adulteriis*; and *Institutiones* in sixteen books. In his Institutes Marcian pursued the plan of Gaius'[231] Institutes, but in greater detail and with an addition of Public Law.[232] The Institutes of Marcian were made use of by the 6th century Tribonian and his colleagues in writing Justinian's Institutes.[233]

Marcian was a heavy contributor to the Digest of Justinian, which contains 283 extracts from his works.[234] The following excerpts show Marcian's style. "The burden of proof always rests on him who makes a claim.[235] A gift is that which without any legal compulsion or duty is voluntarily bestowed.[236] (Of two dying together in a common disaster) neither is presumed to survive the other.[237]"

§ 94 **Modestinus.** Herennius Modestinus (died after[238] A.D. 244) is the last Roman jurist to succeed to eminence. He was probably a pupil of the famous jurist Ulpian.[239] Modestinus was at one time a law teacher to the Emperor Maximin's son, who with the father was murdered A.D. 238. In the year

[225] *Dig.* 39, 1, 22.
[226] *Dig.* 39, 6, 38.
[227] *Dig.* 50, 17, 183.
[228] *Dig.* 50, 17, 192, 1.
[229] Clark, *Roman private law: sources*, p. 141.
[230] See infra § 98.
[231] See supra § 86.
[232] Krueger, *Quellen*, etc., pp. 229, 300; Clark, *Id.* p. 141.
[233] See *Inst.* 4, 3, 1.
[234] Roby, *Introduction to the Digest*, p. cciv.
[235] *Dig.* 22, 3, 21.
[236] *Dig.* 50, 16, 214.
[237] *Dig.* 34, 5, 18, pr.
[238] Clark, *Roman private law: sources*, pp. 138, 139.
[239] See infra § 108.

244 Modestinus was a high officer of state (a *praefectus vigilum*[240]) under the Emperor Gordian.

Modestinus was the author of fifteen works, the chief of which are: *Responsa* (nineteen books), *Pandekton* (twelve books), *Regulae* (ten books), *Differentiae* (nine books), *Excusationes* (six books), and Punishments (four books). The *Excusationes*[241] (grounds for relieving guardians from acting as such) are unique in that this work was not written in Latin, but in Greek. Modestinus contributed very heavily to the Digest of Justinian, which contains 344 extracts from Modestinus.[242]

The following passages show that the high reputation of Modestinus as a jurist was well deserved: "The scope of law is this: to command, forbid, allow, punish.[243] Subsequent statutes have more force in law than earlier ones.[244] A debtor is understood to be a person from whom against his will money can be exacted.[245] A legacy is a gift left by a will.[246] Whoever, although very remote in degree, become heirs to a deceased person are regarded as heirs just as much as if they are heirs of the first degree.[247] Persons related by affinity are the relatives of husband and wife.[248] There are no grades of affinity.[249]"

Neratius. Lucius Neratius Priscus (consul A.D. 83 or 98) **§ 95** was a member of the Emperor Trajan's[250] Council. At one time he was so influential with Trajan that it was supposed that he, and not Hadrian, was intended as his successor. Neratius and Celsus *filius*[251] succeeded Celsus *pater*[252] as joint heads of the school started by Labeo.[253] Neratius wrote some important works: the *Regulae*, *Membranae*, and *Responsa*. In the Digest of Justinian are 64 extracts and 128 citations

[240] See the *Lis fullonum*, Bruns, *Fontes juris*[6], pp. 362, 3.
[241] See *Dig.* 17, 1.
[242] Roby, *Introduction to the Digest*, p. ccvii.
[243] *Dig.* 1, 3, 7.
[244] *Dig.* 1, 4, 4. See Brown, *Legal Maxims*, p. 23.
[245] *Dig.* 50, 16, 108.
[246] *Dig.* 31, 36. See Phillimore, *Maxims*, p. 340.
[247] *Dig.* 50, 17, 94.
[248] *Dig.* 38, 10, 4, 3.
[249] *Dig.* 38, 10, 4, 5.
[250] Reigned A.D. 98–117.
[251] See supra § 83.
[252] See supra § 82.
[253] See supra § 90.

of Neratius' works.[254] The following are important passages: "Fraud is always punishable.[255] Nowhere in law should ignorance of fact and ignorance of law be put on the same footing; the wisest may be mistaken on construing a fact.[256] Three members make a corporation.[257]"

§ 96 **Nerva** (*pater*). Marcus Cocceius Nerva (died A.D. 33) was the grandfather of the Emperor Nerva.[258] Nerva the jurist succeeded Labeo[259] as head of his school. Nerva held high offices of state including the consulship[260] and *curator aquarum* (water commissioner of Rome). Nerva is cited over thirty times in the Digest of Justinian.[261] Nerva was the father of a jurisconsult less distinguished than himself, — Nerva *filius*. When Nerva alone is employed, it means Nerva *pater*.

§ 97 **Nerva** (*filius*). This jurist Nerva (praetor designate A.D. 65) is called *filius* to distinguish him from his father.[262] Nerva the son was joint head with the famous Proculus[263] of the school started by Labeo.[264] Nerva was probably the father of the Emperor Nerva. The opinions of Nerva the son are frequently cited in the Digest of Justinian.

§ 98 **Papinian.** Aemilius Papinianus (died A.D. 212) was the greatest of Roman jurists. He came to Rome from the East, perhaps from the province of Syria. At one time Papinian probably taught law at Berytus — modern Beirut — (which place during the Later Empire became the seat of a very famous Roman law school). Papinian[265] was a pupil of the

[254] Roby, *Introduction to the Digest*, p. clix.
[255] *Dig.* 44, 4, 11, 1.
[256] *Dig.* 22, 6, 2. See Phillimore, *Maxims*, p. 96.
[257] *Dig.* 50, 16, 85 (Neratius as reported by Marcellus).
[258] Reigned A.D. 96–8.
[259] See supra § 90.
[260] *Suffectus*, — explained supra § 80.
[261] Roby, *Introduction to the Digest*, p. cxliv.
[262] See supra § 96.
[263] See infra § 102.
[264] See supra § 90.
[265] On Papinian, see *Great jurists of the world*, pp. 17–31 (vol. ii of *Continental Legal History Series*, Boston 1914); Costa, *Papiniano*, 4 vols., Bologna, 1894–98.

distinguished jurist Scaevola,[266] studying under him at the same (§ 98) time when the future Emperor Severus did. Papinian became an intimate friend and connection by marriage of Severus, who made him *magister libellorum* ("master of petitions,"[267] whose duty was to draft the Imperial rescripts) and in A.D. 203 praetorian prefect (*praefectus praetorio*[268], the highest officer of state next to the Emperor). The praetorian prefects had not only large military power, but exercised the highest criminal and civil jurisdiction next to the Emperor.

Papinian's court must have been a remarkably able tribunal, for at one time the famous jurists Ulpian[269] and Paulus[270] were among his assistant judges.[271] This court visited the island of Britain during Severus' reign. Papinian was at York at the time of Severus' death in A.D. 211. Before Severus died, he commended to Papinian his two sons Caracalla and Geta. When Geta was murdered by his imperial colleague, Papinian was asked by Caracalla to justify the murder of his brother before the Senate and people, — but refused, saying that "It was easier to commit than to defend parricide."[272] This answer cost Papinian his life. But his death was thoroughly in accord with his lofty standard of human conduct that "whatever is immoral we should consider to be impossible."[273]

Papinian was the author of *Quaestiones* in thirty-seven books, *Responsa* in nineteen books, *Definitiones*, *De adulteriis*, and a treatise written in Greek[274] the Latin title of which would be[275] *De officio aedilium curulium*. The Digest of Justinian draws

[266] See infra § 105.

[267] Roby, *Introduction to the Digest*, p. cxci.

[268] Papinian had probably already served as judge (*assessor*) in the court of the praetorian prefect: *Dig.* 22, 1, 3, 3.

[269] See infra § 108.

[270] See infra § 99.

[271] Spart. *Pesc.* 7; Lampr. *Alex. Sev.* 26. See *Dig.* 12, 1, 40; Roby, *Id* p cxciii.

[272] Spartian, *Caracal.* 8.

[273] See *Dig.* 28, 7, 15.

[274] The Greek title was "Αστυνομικὸς μονόβιβλος."

[275] Karlowa, *Rom. Rechtsgeschichte*, i, 737; Clark, *Roman private law: sources*, p. 130.

(§ 98) very heavily upon Papinian,—601 extracts and 153 citations[276] from the "prince of jurisconsults." Papinian followed the casuistic methods of Scaevola. The style of Papinian is clear and profound, very adequate in expression, not too many or too few words, the right word in the right place.[277] He is the master jurist.

The 4th century Constantine the Great took away[278] all authority from the notes of Ulpian and Paulus on Papinian, thus showing how high was his authority. The 5th century Theodosius II and Valentinian III decreed that in disputed questions of law the opinion of Papinian should be decisive as against all other jurists.[279] The 6th century Justinian decreed that third-year law students should be called *Papinianistae*[280] in memory of Papinian, whom Justinian praises as *splendissimus, summi ingenii, sublimissimus, acutissimus, pulcherrimus, maximus*.[281] In Papinian Greek and Roman culture found its highest combined expression. After Papinian Roman jurisprudence began to decline.

The following extracts from Papinian's works exhibit his brilliant legal genius: "This is considered a gift which is yielded under the compulsion of no legal right.[282] No one may change his purpose to the violation of another's right.[283] A person is not regarded as having lost property which he did not own.[284] The law always draws an inference of fraud not from the event alone but from the intention.[285] In all law particular words derogate from general words, and that expression is the most potent which points to a specific object.[286] Whatever has been paid by mistake, or illegally, or for a cause followed by

[276] Roby, *Introduction to the Digest*, p. cxcvi.

[277] See Esmarch, *Rom. Rechtsgeschichte*[2], § 133.

[278] *Cod. Theod.* 1, 4, 1.

[279] *Cod. Theod.* 1, 4, 3.

[280] Const. *Omnem*, § 4. A feast was always given to celebrate the first lecture on Papinian.

[281] See Const. *Deo auctore*, § 6; Const. *Omnem*, §§ 1, 4.

[282] *Dig.* 50, 17, 82.

[283] *Dig.* 50, 17, 75. See Phillimore, *Maxims*, p. 31.

[284] *Dig.* 50, 17, 83. See Phillimore, *Id.* p. 63.

[285] *Dig.* 50, 17, 79. See Phillimore, *Id.* p. 42.

[286] *Dig.* 50, 17, 80. See Phillimore, *Id.* p. 50.

no effect, may be recovered by an action.[287] A rule of public policy cannot be changed by a private contract.[288]"

Paulus. Julius Paulus[289] (died after[290] A.D. 222) was a pupil of the famous jurist Scaevola.[291] Paulus was a contemporary of the jurist Ulpian[292] and with him was an associate judge in the court of the praetorian prefect — the highest court of the Empire save the Emperor in Council — while the brilliant jurist Papinian[293] was prefect. Paulus himself subsequently served as praetorian prefect under the Emperors Caracalla or Elagabalus and Alexander Severus. Whether Paulus shared the fate of Ulpian is not known. § 99

Paulus is the most prolific writer cited by the Digest of Justinian, being the author of seventy works, the chief of which are: a Commentary on the Edict in eighty books; *Quaestiones* in twenty-six books; *Brevia* in twenty-three books; *Responsa* in twenty-three books; Commentaries on the earlier jurists Sabinus[294] (sixteen books), Plautius[295] (eighteen books), Vitellius[296] (four books), and Neratius[297] (four books); Notes on the earlier jurists Scaevola[298] and Papinian[299]; Epitomes of Alfenus Varus[300] and Labeo[301]; *Ad leges* (Julia et Papia Poppaea); *Ad legem Sentiam; Fideicommissa; De censibus;*

[287] *Dig.* 12, 6, 54. See Phillimore, *Id.* p. 69.

[288] *Dig.* 2, 14, 38. See Phillimore, *Id.* p. 66.

[289] Although the modern French and many English Civilians (e.g. Amos, Bryce, Hunter, Muirhead, Walton) call him "Paul," the name Paulus is not a praenomen or first name, but a family name; and to avoid confusion it is preferable to retain the Latin family name (as is done for L. Aemilius Paulus who conquered Macedonia in 168 B.C.), — and such is the practice adopted by Sohm (Ledlie translator), Williams, and Leage in their modern Roman law works.

[290] Clark, *Roman private law: sources*, p. 132.

[291] See infra § 105.

[292] See infra § 108.

[293] See supra § 98.

[294] See infra § 103.

[295] Lived c. Vespasian or a little later.

[296] Lived prior to A.D. 98, — the end of Nerva's reign.

[297] See supra § 95.

[298] See infra § 105.

[299] See supra § 98.

[300] Died after 39 B.C.

[301] See supra § 90.

(§99) *De jure fisci; De officio proconsulis; De adulteriis; Decreta; Regulae Sententiae*[302]*; Institutiones; Manualia;* and forty-eight monographs on all kinds of legal subjects.[303] More than a sixth of the Digest of Justinian is taken from Paulus.[304] Paulus contributed 2081 extracts,[305] — the largest contribution of any other Roman jurist, Ulpian alone excepted.

The following excerpts from Paulus are evidence of his ability as a jurist: "Ignorance of the law does not excuse; ignorance of fact does.[306] No one should be dragged out of his house to court.[307] Later statutes repeal earlier statutes.[308] Equity is to be regarded in all things especially in administering the law.[309] It is in accordance with natural equity that the benefits of property should go to him who suffers its inconveniences.[310] No one commits an actionable wrong unless he did that which he had no legal right to do.[311] No one is a wrongdoer except him who does what the law does not permit.[312] Whatever was originally void cannot be cured by lapse of time.[313] He acts fraudulently who sues for what he must restore.[314] Change of domicil is accomplished by actions, not by a mere declaration.[315] No one can leave to his heir a greater advantage than he himself had.[316] He who is silent does not admit as

[302] For the *text* see vol. ii, *Collectio librorum juris ante-Justiniani* (ed. Krueger, Mommsen, Studemund). There is a French translation of the Sententiae: see French translation of Corpus Juris Civilis, "Le trésor, etc." See also infra vol. iii, § 948.

[303] See Roby, *Introduction to the Digest*, p. ccii, for a list of these.

[304] Roby, *Id.* p. cciii.

[305] Roby, *Id.*

[306] *Dig.* 22, 6, 1. See Code 1, 18, 10 and Broom, *Legal Maxims*, p. 185.

[307] *Dig.* 2, 4, 21. See Broom, *Legal Maxims*, p. 321.

[308] *Dig.* 1, 3, 26. See also *Dig.* 1, 4, 4 (Modestinus) and Broom, *Legal Maxims*, pp. 23–5. With Paulus' statement goes well the following from *Code*, 1, 14, 7: "A law ought to be prospective and not retrospective in its operation."

[309] *Dig.* 50, 17, 90. See Phillimore, *Maxims*, p. 265.

[310] *Dig.* 50, 17, 10. See Phillimore, *Id.* p. 138.

[311] *Dig.* 50, 17, 151.

[312] *Dig.* 12, 6, 53. See Phillimore, *Id.* p 71.

[313] *Dig.* 50, 17, 29. See Phillimore, *Id.* p. 82.

[314] *Dig.* 50, 17, 173, 3. See Phillimore, *Id.* p. 233.

[315] *Dig.* 50, 1, 20. See Phillimore, *Id.* p. 162.

[316] *Dig.* 50, 17, 120.

well: but yet it is true that he does not deny.[317] He who can do the greater can do the less.[318]"

Pegasus. The jurist Pegasus (probably consul[319] A.D. 78 or 79) held all the high offices of state and several provincial governorships before becoming *praefectus urbi* (city prefect) in the reign of Vespasian. Two very important statutes[320] were enacted during his consulship,[321] the more important of which was the famous SC. Pegasianum concerning trust-bequests (*fideicommissa*). So able a jurist was he that he succeeded Proculus[322] as head of the school founded by Labeo.[323] Pegasus is cited twenty-eight times in the Digest of Justinian.[324] § 100

Pomponius. Sextus Pomponius (died after[325] A.D. 161) apparently was a pupil of the famous jurists Pegasus[326] and Aristo.[327] Pomponius was a voluminous writer. He was the author of a Commentary on Sabinus in thirty-five books, a Commentary on Q. Mucius[328] in thirty-nine books, a Commentary on the Edict in probably seventy-nine books, and other works entitled *Enchiridion* (Handbook), *Senatusconsulta*, *Epistulae*, *Variae lectiones*, and Notes on Aristo.[329] In the Digest of Justinian are 578 extracts and over 400 citations of Pomponius' works.[330] The following are characteristic of Pomponius: "The laws are adapted to cases which most frequently occur.[331] What is ours cannot, without an act of ours, be transferred to another.[332] Whatever any one suffers through his own fault does not damage him.[333] Whatever not owed § 101

[317] *Dig.* 50, 17, 142.
[318] *Dig.* 50, 17 10.
[319] *Inst.* 2, 23, 5.
[320] See Gaius 1, 31; 2, 254 and 258.
[321] His colleague was Pusio.
[322] See infra § 102.
[323] See supra § 90.
[324] Roby, *Introduction to the Digest*, p. cli.
[325] Clark, *Roman private law: sources*, p. 117.
[326] See supra § 100; *Dig.* 31, 43, 2.
[327] See supra § 78.
[328] Scaevola, the famous Republican jurist: see supra § 53.
[329] See supra § 78.
[330] Roby, *Introduction to the Digest*, p. clxxii.
[331] *Dig.* 1, 3, 3. See Broom, *Legal Maxims*, p. 35.
[332] *Dig.* 50, 17, 11. See Phillimore, *Maxims*, p. 278.
[333] *Dig.* 50, 17, 203. See Phillimore, *Maxims*, p. 247.

is paid by mistake, this or as much may be recovered.[334] In every obligation in which no time (for performance) is set, performance is due immediately.[335] There is an opposition from the very nature of things between the words 'testate' and 'intestate.'[336]"

102 **Proculus.** Sempronius[337] Proculus probably was a contemporary of the Emperor Tiberius[338] and his immediate successors. What is really known about him is the statement of Pomponius[339] that Proculus succeeded Nerva[340] as head of the school founded by Labeo.[341] Because of his eminence as a jurist the school founded by Labeo was finally known as the **Proculian.**[342] Proculus wrote a valuable work of opinions on cases submitted to him, entitled the *Epistulae.* In the Digest of Justinian there are 37 extracts and 134 citations of Proculus' works.[343] Proculus is always quoted with great respect, — for instance, *Proculum, sane non levem juris auctorem.*[344]

103 **Sabinus** (Masurius). The jurist Masurius Sabinus (died c.[345] A.D. 64) was the first licensed jurisconsult to exercise the privilege of *jus respondendi,* being appointed by Augustus c.[346] A.D. 14. Sabinus was the author of three famous books on the *jus civile,* upon which three great subsequent jurists — Pomponius,[347] Ulpian,[348] and Paulus[349] — wrote celebrated commentaries.[350] But Sabinus' own work is not cited at all in the Digest of Justinian, although in the latter there are over 200

[334] *Dig.* 12, 6, 7.
[335] *Dig.* 50, 17, 14.
[336] *Dig.* 50, 17, 7.
[337] Given in *Dig.* 31, 47.
[338] Reigned A.D. 14–37.
[339] See supra § 101.
[340] See supra § 96.
[341] See supra § 90.
[342] Ulpian, *Regulae,* 11, 28; *Vatican Frag.* 266; *Inst.* 2, 25.
[343] Roby, *Introduction to the Digest,* p. cl.
[344] *Dig.* 37, 14, 17, pr.
[345] He commented upon the SC. Neronianum, the date of which may be as early as A.D. 54 or as late as 64. See Gaius 2, 218; Moyle, *Inst. of Justinian,* vol. i (5th ed.) p. 290; Clark *Roman law: sources,* p. 108, n. 41.
[346] Clark, *Id.*
[347] See supra § 101.
[348] See infra § 108.
[349] See supra § 99.
[350] Pomponius' commentary was in thirty-five books, Ulpian's in fifty-one, and Paulus' in sixteen books.

references to Sabinus' other works.[351] Sabinus was the successor of Capito in his school, and gained such a reputation as a law teacher[352] that this school of law was finally called the **Sabinian.**

Sabinus. (Caelius). Cnaeus Arulenus Caelius Sabinus (consul[353] A.D. 69) was the successor of Cassius as head of the school started by Capito. He became a high authority during Vespasian's reign.[354] He is cited a few times in the Digest of Justinian.[355] When Sabinus alone is mentioned, it generally refers to Masurius Sabinus.[356] § 104

Scaevola. Quintus Cervidius Scaevola (died after[357] A.D. 193) was the principal legal adviser of the Emperor Marcus Aurelius. The Republican jurist Scaevola[358] is generally referred to as Q. Mucius; when Scaevola alone is used, it usually means the Imperial jurist Q. Cervidius. Scaevola was a Greek by birth. He adopted the casuistic method of setting forth Roman law, expounding it by answers to concrete legal cases. Among Scaevola's pupils were the future Emperor Septimius Severus,[359] the jurist Paulus[360] who later became eminent, and the brilliant Papinian[361] — greatest of Roman jurists. § 105

Scaevola wrote some very valuable and important works: *Digesta* in forty books; *Quaestiones* in twenty books; *Responsa* in six books; *Regulae* in four books; *De quaestione familiae;* and *Quaestiones publice tractatae.* The later jurists Paulus[362] and

[351] Such as his *Memoralia; Responsa; Ad edictum praetoris urbani; Ad Vitellium; Fasti; Commentarii de indigenis.* See Roby, *Introduction* to the *Digest,* p. cxliv.

[352] See supra § 74.

[353] *Suffectus,* — explained supra § 80.

[354] See Tacitus, *Hist.* i, 77: *Dig.* 1, 2, 2, 53. Vespasian reigned A.D. 69–79.

[355] See *Dig.* 21, 1, 14, 17, 20, 38 and 65; *Dig.* 35, 1, 72, 7.

[356] See supra § 103.

[357] Clark, *Roman private law: sources,* p. 128.

[358] See supra § 53.

[359] Spart., *Caracalla,* 8.

[360] See supra § 99.

[361] Papinian (see supra § 98) was a lecturer in Scaevola's school: Roby, *Introduction to the Digest,* p. cxci.

[362] See supra § 99.

Tryphoninus[363] wrote notes on his works. Scaevola contributed very much to the Digest of Justinian, which contains 306 extracts and 61 citations of Scaevola.[364]

The following passages show his style: "It is theft when anyone knowingly has received money not owed to him.[365] Whatever is written in a will in such a way that it cannot be understood, is regarded as if it had not been written at all.[366] What the majority of a local governing body (curia) does is regarded as if done by all."[367]

§ 106 **Tertullian.** Perhaps the jurist Tertullianus who wrote his works prior[368] to A.D. 212 is the same person as the famous Christian Church father Quintus Septimius Florens Tertullianus[369] (c. 155–c. 122). The ecclesiastical Tertullian was well acquainted with Roman law, which he studied at his birthplace, Carthage, and later at Rome where, Eusebius says, Tertullian became an eminent jurist. The ecclesiastical Tertullian was converted to Christianity in his mature manhood, and he never forgot his earlier life as a lawyer in his later career as a Christian presbyter — his extant ecclesiastical works abound in legal figures and exhibit the professional art of the advocate.[370] But to connect Tertullian with the *SC. Tertullianum* is not well founded.[371]

The probabilities are that the ecclesiastical Tertullian is the same Tertullian who wrote *Quaestiones* in eight books and *De castrensi peculio*. In the Code[372] and Digest[373] of Justinian there are five extracts and four citations from Tertullian.[374]

[363] See infra § 107.

[364] Roby, *Introduction to the Digest*, p. clxxxvii.

[365] *Dig.* 13, 1, 18.

[366] *Dig.* 50, 17, 73, 3.

[367] *Dig.* 50, 1, 19.

[368] See Roby, *Introduction to the Digest*, p. clxxxix.

[369] See Roby, *Id.* p. cxc.

[370] See Glover, *The conflict of religions in the Early Roman Empire*, ch. x.

[371] This SC. is of uncertain date, being generally referred to the time of Hadrian (A.D. 117–38) or Antoninus Pius, (A.D. 138–61). See Roby, *Introduction to the Digest*, p. clxxvi.

[372] *Code*, 5, 70, 71.

[373] See particularly *Dig.* 29, 1, 23 and 33; *Dig.* 49, 17, 4: *Dig.* 1, 3, 27; *Dig.* 41, 1, 28; *Dig.* 29, 2, 30, 6.

[374] Roby, *Introduction to Digest*, p. clxxxix.

Tryphoninus. Claudius Tryphoninus (died after[375] A.D. 213) § 107 is sometimes referred to as Claudius. Tryphoninus served with the jurist Papinian[376] in the Council of some Emperor,— probably Severus.[377] Tryphoninus seems to have been a pupil of the famous jurist Scaevola,[378] on whose *Digesta* he wrote notes.[379] There are eighty extracts in the Digest of Justinian taken from Tryphoninus' *Disputationes* written in twenty-one books.[380] The following is an interesting extract: "There is no indulgence in the law on account of age for him, who, while invoking the law, breaks the law."[381]

Ulpian. Domitius Ulpianus (died A.D. 228[382]) was a Syrian § 108 by birth, born of a Tyrian family.[383] It is quite likely that at one time Ulpian was professor at law at Berytus,[384] modern Beirut (which during the Later Empire became the seat of a very famous law school). Removing to Rome, Ulpian with the jurist Paulus[385] became an associate judge of Papinian,[386] the greatest of Roman jurists, then praetorian prefect. Under the Emperor Alexander Severus, Ulpian filled high offices of state,[387] and in A.D. 222[388] became praetorian prefect, the office next highest to the Emperor. Six years later while instituting reforms—probably trying to subject the military to the civil power—Ulpian lost his life in a tumult of the soldiers against him.

[375] There is a rescript of Caracalla's, A.D. 213, addressed to Tryphoninus; see *Code*, 1, 9, 1.

[376] See supra § 98.

[377] *Dig.* 49, 14, 50.

[378] *Dig.* 20, 5, 12, 1; *Dig.* 49, 17, 19, pr.; and supra § 105.

[379] *Dig.* 26, 7, 58, 1; *Dig.* 18, 7, 10.

[380] Roby, *Introduction to the Digest*, p. cxci.

[381] *Dig.* 4, 4, 37.

[382] Clark, *Roman law: sources*, p. 136.

[383] *Dig.* 50, 15, 1, pr.

[384] Bremer, *Die Rechtschulen*, p. 87; Roby, *Introduction to the Digest*, p. cxcvii.

[385] See supra § 99.

[386] See supra § 98.

[387] *Praefectus annonae*,—see *Code*, 8, 37 (38), 4; *Magister ad libellos*,—Spartianus, *Vita Pesc. Nig.* vii, 3, 4.

[388] On Dec. 1: *Code*, 4, 65, 4.

(§ 108) Ulpian was the author of twenty-three works. His huge Commentary on the Edicts in eighty-three books is his greatest work. He also wrote an exhaustive Commentary on Sabinus[389] in fifty-one books, a treatise *Ad leges (Julia et Papia Poppaea)* in ten books, *Disputationes* in ten books, *De omnibus tribunalibus* in ten books, *De officio proconsulis* in ten books, *Fideicommissa* in six books, *De censibus* in six books, *De officio consulis* in three books, *Institutiones* in two books, *De officio praetoris tutelaris* in one book, *De appellationibus*, *De adulteriis* in five books, *De officio praefecti urbi*, *Regulae*,[390] *Pandectae*, *Ad legem Sentiam* in four books, and notes on the earlier jurists Papinian[391] and Marcellus.[392]

Of all Roman jurists Ulpian is the largest contributor to the Digest of Justinian, which contains 2464 extracts from Ulpian.[393] More than a third of Justinian's Digest is taken from Ulpian.[394] No other Roman jurist was paid by Justinian's commission such a tribute in the use of his writings as was Ulpian.

Ledlie's characterization of Ulpian's great genius is very illuminating: "Thanks to the liberal extent which Justinian's compilers drew on his works in composing the Digest, Ulpian has probably exercised a larger influence over European jurisprudence than any other jurist. . . . Ulpian was not a lawyer of the strong originative type like Labeo, Salvius Julianus, and Papinian, the type that may be said to create — or, rather, to discover the law. Ulpian's powers did not lie in the direction of arduous pioneer-work. His was rather the faculty of lucid, orderly exposition. . . . He is a consummate master of lucid expression — indeed with Gaius, the

[389] See supra § 103.

[390] The *text* of this work is given in vol. ii, *Collectio librorum juris ante-Justiniani* (ed. Krueger, Mommsen, and Studemund). Among English translations of the *Regulae* are those of Muirhead, and Abdy and Walker. See infra vol. iii, § 948.

[391] See supra § 98.

[392] See supra § 92.

[393] Roby, *Introduction to the Digest*, p. cc.

[394] Roby, *Id.*, p. cxcix.

greatest master of clear exposition among the Roman jurists."[395]

The following extracts are evidence of Ulpian's greatness: "No one by his own wrongdoing can make his condition better.[396] No one can transfer a greater legal right to another than he himself had.[397] Nothing is so opposed to consent . . . as force and threats.[398] For honest advice there is no liability; but if fraud and cunning intervene an action for fraud will lie.[399] The beginning and the consideration of every contract are to be considered.[400] Ratification is equivalent to a command.[401] The partner of my partner is not my partner.[402] The act of the majority done publicly binds everybody.[403] In obscure phrases we follow the least obscure.[404] The judgment of a court is accepted as the truth.[405]"

Venuleius. Venuleius Saturninus (died after[406] A.D. 161) § 109 presents an interesting problem of identification. Three persons of the name of Saturninus are mentioned in the Digest,[407] all of whom are of the age of the Antonine Emperors. Probably these three are one, and Venuleius' full name was Quintus Claudius Venuleius Saturninus.[408] He was governor of a province under Hadrian, an officer of state under Antoninus Pius, and praetor under Marcus Aurelius.

[395] *Great jurists of the world*, p. 39 (vol. ii, *Continental Legal History Series*, Boston, 1914).

[396] *Dig.* 50, 17, 134. See Phillimore, *Maxims*, p. 224.

[397] *Dig.* 50, 17, 54.

[398] *Dig.* 50, 17, 116.

[399] *Dig.* 50, 17, 47. See Phillimore, *Maxims*, p. 237.

[400] *Dig.* 17, 1, 8, pr. See Phillimore, *Maxims*, p. 336.

[401] *Dig.* 46, 3, 12, 4. See Brown, *Legal Maxims*, p. 674.

[402] *Dig.* 50, 17, 47, 1. See Phillimore, *Maxims*, p. 188.

[403] *Dig.* 50, 17, 160, 1. See Phillimore, *Id.* p. 76.

[404] *Dig.* 50, 17, 9. See Phillimore, *Id.* p. 300.

[405] *Dig.* 50, 17, 207. See Phillimore, *Id.* p. 287.

[406] He wrote certainly after the death of Hadrian in A.D. 138, and probably lived into the reign of Marcus Aurelius. See Clark, *Roman private law: sources*, p. 121.

[407] *Dig.* 48, 19, 15 and 16; *Dig.* 17, 1, 6, 7; *Dig.* 34, 2, 19, 7; *Dig.* 12, 2, 13, 5; *Dig.* 4, 3, 7, 7; *Vatican Frag.* 223.

[408] Clark, *Roman private law. sources*, p. 122; Karlowa, *Rom. Rechtsgeschichte*, i, p. 730. Contra: Roby, *Introduction to Digest*, p. cxxxiv.

Venuleius was the author of five well-known works: *Stipulationes*, *Actiones*, *De officio proconsulis*, *Publica*, and *De poenis paganorum*. In the Digest of Justinian there are seventy-one extracts from Venuleius.[409] The following passages show his style: "Buildings go with the land.[410] There is no room for conjecture as to that which is definite and ascertainable.[411]"

§ 110 **Vivian.** The jurist Vivianus must have lived during the 1st century A.D., for he reports[412] decisions of Sabinus,[413] Cassius,[414] and Proculus.[415] His own opinions were so valuable as to be referred to by the 2d century jurists Pomponius,[416] Scaevola,[417] and Ulpian.[418] Vivian is cited sixteen times in the Digest of Justinian.[419]

(4) Sources of Roman Law During the Early Empire

§ 111 1. **Statutes of the assemblies (leges, plebiscita).** Although the Republican legislative assemblies were not abolished by Augustus in establishing the Empire and under the first two Emperors continued to pass laws, yet with the gradual increase of the Imperial power the authority of the various comitia declined. By the end of the 1st century A.D. the Senate had superseded the various legislatures[420] of the Roman people as the law-making body. In the reign of Nerva[421] was passed the last recorded lex. There are, however, some noteworthy Imperial leges, such as the celebrated marriage laws enacted under Augustus — the leges Julia[422] and Papia Poppaea.[423]

[409] Roby, *Introduction to the Digest*, p. clxxxiii.
[410] *Dig.* 43, 24, 10.
[411] *Dig.* 45, 1, 137, 2. See Phillimore, *Maxims*, p. 368.
[412] See *Dig.* 29, 7, 14.
[413] See supra § 103.
[414] See supra § 81.
[415] See supra § 102.
[416] *Dig.* 13, 6, 17, 4; see supra § 101.
[417] *Dig.* 29, 7, 14; see supra § 105.
[418] *Dig.* 4, 2, 14, 5; see supra § 108.
[419] Roby, *Introduction to the Digest*, p. cliv.
[420] See supra § 49.
[421] A. D. 96–8.
[422] *Lex Julia de maritandis ordinibus*, enacted A.D. 4.
[423] Enacted A.D. 9.

§ 112 **2. Praetorian and other Edicts.** For the first century and a half of the Empire the *jus honorarium* as embodied in the edicta of magistrates was a source of Imperial Roman law. But when in A.D. 131 the jurist Julian, acting under instructions from the Emperor Hadrian, finished the great work of compiling the praetorian and aedilician Edicts, the Edictal law became fixed and permanent.[424] Thereafter the jus honorarium ceased to grow, for magistrates were compelled to issue the Edictum Hadrianum as arranged by Julian. Ambiguities were decided by the Emperors, and supplements were added by Imperial statues.

§ 113 **3. Opinions of jurisconsults (responsa prudentium).** An important source of law during the Early Empire were the opinions of the Imperial jurists, particularly those jurisconsults licensed by Augustus and succeeding emperors to exercise the *jus respondendi* — thus imposing upon judges the authority of their decisions.[425] Responsa of jurisconsults were a source of Early Imperial Roman law until the middle of the 3d century,[426] if not later.[427]

§ 114 **4. Decrees of the Senate (senatusconsulta).** In A.D. 16 through the efforts of the Emperor Tiberius an attempt was made to transfer to the Senate[428] the legislative power of the assemblies of the people, which was quite successful.[429] The Senate continued to put forth more and more enactments, the validity of which as statutes was fully recognized prior to the reign of Antoninus Pius[430] and the middle of the 2d century.

At the close of the 1st century, senatusconsulta had entirely superseded leges: thereafter Senate acts or decrees were the normal source of law during the Early Empire until the reign

[424] See supra § 61.

[425] See supra §§ 68 et seq.

[426] The last jurisconsult who arose to eminence was Modestinus (died after A.D. 244): see supra § 94.

[427] See supra § 68.

[428] During the Republic the Senate rarely legislated: see supra § 49.

[429] *Dig.* 1, 1, 2, 9; Tacitus, *Annales*, 1, 15: "Tum primum e campo comitia ad patres translata sunt." But some authorities hold that this passage refers to the electoral comitia and not to the legislative bodies.

[430] A.D. 138–61.

of Septimius Severus in the beginning of the 3d century,[431] when senatusconsulta were in turn superseded by the statutes of the Emperors. The decrees of the Senate were regarded by the Imperial jurists as statutory *jus novum*, — law often widely different from the old jus civile and more in harmony with the principles of the Edict.

A senatusconsultum was quite different in form from a lex in that it lacked the imperative character of the latter[432]: the presiding Consul or Emperor as *princeps senatus* laid his proposed law before the Senate in an *oratio* and this received the approval (*auctoritas*) of the Senate; the next step would have been to send the bill to the comitia[433] for its action, — but under the Empire this reference soon ceased. And at the end of the 2d century the supremacy of the Emperor had become so pronounced that the *oratio principis* was quoted as law instead of the Senate resolution which gave it legislative sanction.

§115 5. **Imperial Statutes (constitutiones).** By virtue of his supreme authority the Emperor possessed power to legislate directly. Originally and perhaps for the first century of the Empire, the Emperors were invested with absolute power by a *lex regia* which gave him Imperial authority, thus apparently recognizing the supremacy of the Senate — the Emperor was only the "first citizen" of the State.[434] Later the existence of such lex regia became presumed.[435]

Until however the decline of senatusconsulta became rapid, the Emperor legislated but rarely. But beginning with the age of the Antonines statutory and direct expressions of the Emperor's will — known under the general term of "Constitutions" — became an ever-increasing source of Roman law. And although in the 3d century A.D. the Senate theoretically had the right to legislate, yet it is doubtful if it actually legislated after the reign of Septimius Severus[436]

[431] A.D. 193–211

[432] For examples of senatusconsulta, see Bruns, *Fontes juris*[6], pp. 160–202

[433] Usually the *Comitia tributa*

[434] See supra, § 55

[435] See Const. *Deo auctore*, § 7 (one of the prefaces to the Digest of Justinian)

[436] His reign ended A.D. 211.

From this time onward down into the 6th century and the reign of Justinian, Imperial statutes became the normal source of the Later Imperial Roman law.

The Imperial Constitutions were of three sorts: edict, decree, and rescript. An Edict (*edictum*) was a general ordinance or statute. A Decree (*decretum*) was a judgment in a suit submitted to the Emperor. It made law: courts must thereafter apply the Imperial solution to analogous cases. A Rescript (*rescriptum*) was an opinion on a point of law, — called technically a Mandate (*mandatum*) when addressed to an official who had solicited the Emperor's advice, or Epistle (*epistola*) when the rescript was addressed to an individual.

(5) Influence of Mature Roman Law on Early Christianity

St. Paul. While Roman law was proceeding to its maturity, § 116
the birth of Christianity occurred and the Christian religion became formulated. Roman jurisprudence provided early Christian teachers, from the apostolic times of the 1st century down to Constantine the Great, with language and modes of thought which were used to express the truths desired to be propagated. For three centuries apostles, martyrs, bishops, and clergy drew on the storehouse of Roman law for linguistic weapons and ethical doctrines.

St. Paul was the only apostle with a legal training, and his personifications in his writings are always legal. Into the language of theology St. Paul incorporated the significance legally of the Roman law *adoption*[437]; it is peculiar to St. Paul and no other sacred writer has used it. St. Paul frequently uses the legal metaphor of the Roman law hereditas (*inheritance* or *heirship*[438]) and the phraseology of the Roman law of *guardianship*.[439]

Ritual of the Church. The ritual of the early Christian § 117
Church reveals the influence of Roman law: parts of the modern ceremony of *baptism*[440] must have been originally framed upon

[437] Ball, *St. Paul and the Roman law*, pp. 4 et seq.
[438] *Id.* p. 13.
[439] *Id.* p. 14.
[440] Ball, *Id.* pp. 12, 38 et seq.

the pattern of the Roman stipulatio (question and answer) and the claiming with the rod (vindicta) as practised in the Roman law adoption. The Roman stipulatio (question and answer) is also seen in the *marriage service*[441] even as existing to-day.

§ 118 **Tertullian.** In the writings of Christian writers of the 2d and 3d centuries the influence of Roman law phraseology is marked. During these centuries Roman jurisprudence was at the height of its intellectual activity. Tertullian, one of the fathers of the church, who was converted to Christianity in A.D. 185 — five years after the death of the Emperor Marcus Aurelius — was the first to employ the word "Trinity" to express the Godhead.[442] Tertullian employed the word "Person" to differentiate the Father, Son, and Holy Spirit. He imported into the sphere of theology the Roman legal conception of a *person*[443] as an individual acting in some particular capacity or condition, and also the corollary that a single person might play many parts (personae); hence God, although a unit, might play several parts (personae) namely Father, Son, and Holy Spirit. How came Tertullian to get this conception of the manifold personality of the Deity? He was a lawyer[444] by profession, and had practised a number of years at Rome prior to his conversion.

§ 119 **Lactantius.** Another noted Church father, Lactantius, who died in A.D. 325, — the very year of the Nicene Council — called his principal work *The Divine Institutes*,[445] wherein he tries to explain the mystic relationship between God and Christ on the basis of the Roman law relationship of the paterfamilias and his son in power. The reason of this is that Lactantius was once a lawyer. He gave his book a name hitherto immemorially reserved for Roman legal text-books, namely "Institutes."[446]

[441] Ball, *St Paul and the Roman law*, pp. 43 et seq.
[442] *Id* p 82
[443] *Id* p. 80
[444] Perhaps actually the noted jurist Tertullian. see supra § 106.
[445] Ball, *Id.* pp. 92–4
[446] Ball, *St. Paul and the Roman law*, p. 92.

II. The Later Empire, A.D. 284–1453: from Diocletian to the overthrow of the Eastern Roman Empire by the Turks

Constitutional and political changes made by Diocletian and Constantine. § 120 Diocletian and his successor Constantine the Great completely reorganized the Roman Empire, transforming it into a highly **centralized open absolutism.** The principate and duarchy came to an end. The autocratic power of the Emperor was no longer concealed as during the Early Empire. All power was vested in the Emperor. The **person of the Emperor** was made more highly respected. Diocletian, and after him Constantine, adopted the diadem and robes of an Asiatic monarch. This transition was easy, for during the Early Empire arose the use of the words "sacred"[447] to denote the "Imperial" dignity of a living Emperor, and "divine"[448] to mean a "deceased" Emperor.

Constantine, who had a consummate genius for organization far greater than that of Diocletian, centralized thoroughly the Roman Empire, and gave it much of the final form which it preserved for over 1100 years from the first to the last Constantine.[449] Moreover, this later Roman imperialism has exercised enormous influence on modern governments, and has reappeared in the monarchies of Western Europe. The organization of the Roman Catholic Church is largely modeled on the Imperial organization of Constantine.

Constantine made **the military power subject to the civil.** He deprived provincial governors of their military authority enjoyed under the Early Empire, which had been too often used to resist the Emperors themselves. The control of the

[447] I.e. the adjective *sacer, sacra,* etc , usually means "Imperial."

[448] I e. the adjective *divus* or *divinus* usually means "deceased " On the decease of every Emperor the custom was introduced, beginning at the death of Augustus, that the Senate might solemnly place him among the gods or deify him. See Gibbon, *Decline and fall of the Roman Empire*, vol. i, ch. iii.

[449] But the 8th century Leo III returned to Augustus' policy as to the organization of provinces, see infra § 173.

(§ 120) army was centralized in the Emperor, who appointed distinct military officers not exercising civil authority. Constantine thus stamped out military despotism and local revolts.

Constantine completed Diocletian's work of **reorganizing the provincial governments.** He divided the entire Empire into four parts, called **prefectures:** the East, Illyria, Italy, and Gaul. Each prefecture was ruled by a praetorian prefect subject to the Emperor. The prefectures were then subdivided into **dioceses,** each administered by a vicar who was subject to the praetorian prefect. The dioceses were subdivided into **provinces,** each under the authority of a provincial governor known as rector, president, duke, or count. Below these were the cities and towns, — the municipal corporations. The government of each city consisted generally of a city council (curia), over which magistrates known as duumvirs[450] or quattuorviri[451] presided. The inhabitants of the municipality were later[452] protected in their rights by a defensor populi, — somewhat analogous to the old Republican tribune.[453]

Constantine **removed the capital** of the Empire **from Rome to Byzantium.** The natural situation of Byzantium, renamed **Constantinople** in honor of Constantine, was most favorable for the exercise of a central authority and for purposes of defense and commerce. Constantine adorned his new capital lavishly, and invited the senators and noble families of old Rome to remove to the new city. Doubtless many of them accepted this invitation which was scarcely distinguishable from a command. To those who maintained a house in the new capital Constantine granted hereditary estates from the Imperial domains in Pontus and Asia.[454] He endowed the new capital with a Senate,[455] and gave to the citizens the privileges

[450] Two in number.

[451] Four in number.

[452] In the reign of Valentinian I., A.D. 364–75.

[453] As to the law concerning all these administrative officers, see infra vol. iii, § 956.

[454] Gibbon, *Decline and fall of the Roman Empire*, vol. ii, ch. xvii.

[455] Gibbon, *Id.*

of the old capital Rome,[456] including frequent and regular distributions of food, wine, and oil.[457]

Constantine also transformed the **Imperial court** on an Oriental basis. He instituted a **new nobility** with high-sounding titles: the *nobilissimi*, *illustres*, *spectabiles*, *egregii*. A large retinue attended the Emperor at court, and gave him obeisance. The absolute powers of the Emperor were exercised through members of his court, whom the Emperor ennobled for their services. **The departments of state were managed by court officials**[458]: the Imperial palace, by the Lord Chamberlain,[459] the reception of ambassadors and the supervision of court officials, by the Chancellor; public revenues, by a Lord Treasurer; the proclaiming of laws, by the Quaestor; the management of the Emperor's private property, by the Lord of the Privy Purse; the Imperial bodyguard, by two military officers of high rank. The debt of modern royal courts to the Imperial court of Constantine for their organization is a large one.

Constantine's political wisdom was shown by the **adoption of Christianity** as a state religion.[460] The Empire had already become largely Christian. Constantine did not, however, proscribe the pagan worship, which was tolerated for many years later. "The new capital of the East gloried in the singular advantage that Constantinople was never profaned by the worship of idols.[461] Constantinople alone enjoyed the advantage of being born and educated in the bosom of the (Christian) faith."[462]

Names descriptive of the Roman Empire from the 4th to the middle of the 15th century. The Roman Empire from Diocletian to Constantine XIII has been described by many names: "Lower," "Later," "Greek," "Graeco-Roman," § 121

[456] *Cod. Theod.* 14, 13; *Cod. Justinian*, 11, 21.

[457] Gibbon, *Id.*; *Cod. Theod.* 14, 16.

[458] See infra vol. iii, § 956.

[459] This and immediately following English titles are but approximations of the Latin titles.

[460] See infra § 145.

[461] Gibbon, *Decline and fall of the Roman Empire*, vol. ii, ch. xx.

[462] *Id.*

(§ 121) "Byzantine," "Eastern," "Eastern Roman." But although these descriptions are convenient and useful, the strictly correct name is *Roman*[1]: for an unbroken continuity existed from Augustus to the last Constantine. To the very end the Emperor always proudly bore the title of "Roman Emperor" and his subjects were always "Romans." The heir to the throne was called "Caesar," as was the usage in Diocletian's time. The Emperor himself never lost his peculiar title of "Augustus" (Σέβαστος, in Greek),—which memorialized the first Roman Emperor, the nephew of Julius Caesar.

To describe the Roman Empire from Diocletian onward as **"Lower,"**[463] or better, **"Later,"** very aptly marks the great actual difference in the character of the Empire before and after Diocletian: the Roman Empire under Diocletian and his successors is characterized by the definite disappearance of the influence of the Senate — the principate of the Early Empire,[464] with the veiled power of the Emperor as "first citizen"[465] of the State, gave way to the undisguised authority of the Emperor as an absolute monarch.

The very words **"Greek," "Graeco-Roman,"** and **"Byzantine"** summarize the unique Graeco-Roman civilization which radiated from Constantinople — the New Rome which for centuries was the bulwark of civilization protecting all Western Europe from being submerged in gross barbarian darkness. The terms **"Eastern"** or **"Eastern Roman"** have a double meaning. Loosely, these designate the Eastern half of the Roman Empire for about a century (A.D. 395–476) prior to the Teutonic destruction of the Roman Empire in Western Europe, when two lines of Emperors ruled as colleagues at Rome and Constantinople although practically independent. But the legitimate use of the terms "Eastern" or "Eastern Roman" is to distinguish, after the year 800, the original Roman Empire at Constantinople from the so-called revived Western Roman Empire established by Charlemagne, and which lasted until 1806 when Napoleon put an end to it.

[463] In French, *Bas-empire.*

[464] In French, *Haut-empire.*

[465] *Princeps.*

[1] "The civilization which radiated from Constantinople was that of the ancient world. New Rome had for 11 centuries conserved the art, the literature, the laws of Greece and Imperial Rome . . . It must never be forgotten that Constantinople was New Rome; the Emperor, the Roman Emperor; the army, the Roman army; and the inhabitants called themselves Romans. To speak of the Greek Empire is entirely incorrect":

Foakes Jackson, *Introduction to the history of Christianity*, London, 1922.

§ 122 **Diocletian's abandonment of the Republican civil procedure of the Early Empire soon obliterated all remaining differences between the jus civile and jus honorarium.** With the advent of the autocratic government of the Later Empire came a pronounced change in the Roman law of this epoch. **In the year 294** Diocletian abolished[466] the centuries-old system of civil procedure originating under the Republic, the cardinal feature of which was that, although the magistrate heard the pleadings in a lawsuit,[467] he did not ordinarily hear the evidence as a judge, but remitted by a short decree (formula) the case for trial to a referee (judex) who was a private citizen.[468]

Diocletian insisted that all causes be tried by the magistrates themselves. Only in exceptional cases was the hearing of the evidence to be delegated to a referee,[469] and even this exceptional practice soon disappeared: in A.D. 342 by a statute of the sons of Constantine, remittance by formula of a case for trial was absolutely prohibited.[470] The result was the obliteration of whatever remained of the old Republican distinction between jus civile and jus honorarium.[471]

§ 123 **The 5th century Valentinian Law of Citations.** A long preparatory step toward the codification of Roman law was the statute[472] of Valentinian III, published from Ravenna in **A.D. 426.** By this statute, which was originally drawn up

[466] *Code*, 3, 3, 2; Hunter, *Roman law*[4], p. 1013; Sohm (Ledlie[3]), *Roman law*, p. 299; Muirhead, *Roman law*[2], p. 360.

[467] The object of the pleadings was to reach a joinder of issue (*litiscontestatio*), — points in dispute which one party denies and the other affirms.

[468] See infra vol. ii, "Civil procedure," §§ 847, 851.

[469] *Code*, 3, 3, 2.

[470] *Code*, 2, 57, 1. See also *Code*, 2, 57, 2.

[471] Not only did the antithesis between proceedings *in jure* and *in judicio* formally disappear, but there was also a practical obliteration of the difference between actions *in jus* and *in factum*, and *actiones directae* and *utiles*. The interdict was transformed into an *actio ex interdicto*. Furthermore, it became possible to liberally amend the pleadings, and to give judgment for specific performance instead of solely for pecuniary damages. Finally, execution by officers of the law became the rule. See Muirhead, *Roman law*[2], p. 361.

[472] *Cod. Theod.* 1, 4, 3. Valentinian was then a child seven years old: Gibbon, *Roman Empire*, vol. iii, ch. xxxiii.

under the Eastern Emperor Theodosius II,[473] official authority was bestowed on the extant writings of five great Roman jurists **Papinian,**[474] **Paulus,**[475] **Gaius,**[476] **Ulpian,**[477] and **Modestinus**)[478] and made their writings citable as authorities for the law in courts of justice. But if Papinian differed from the other four jurists, his statement of the law was to prevail.[479] The Valentinian law[480] also provided that generally[481] all extracts of the writings of earlier jurists used by these five in their own works should possess legal authority, if properly verified. The effect of this enactment of Valentinian III was to restrict the sources of Roman law to the writings of the five great jurists and the Imperial statutes.

(1) Ante-Justinian Codes of Statutes and Collections of Jurisprudence

§ 124 **The Roman law of the Later Empire prior to Justinian exhibited a tendency toward codification, which finally was accomplished by Justinian.** The fourth and latest of the forces transforming Roman law into a world law was Imperial legislation,[482] which put the finishing touches on the task of making Roman law into a law fit for universal use and finally accomplished the gigantic task of embodying it in a codification. "The logical succession to judicial precedents is codification." It was true in the Roman law and will be found true in American law. The plan of digesting and codifying the Roman law was formed by that wonderfully many-sided man Julius Caesar himself and by Ofilius, his friend, the most celebrated of all the Republican jurists.[483] But Caesar's premature death removed all possibility of realization of this plan: over five centuries elapsed before it was realized.

[473] Hunter, *Roman law*[4], p. 79.
[474] See supra § 98.
[475] See supra § 99.
[476] See supra § 86.
[477] See supra § 108.
[478] See supra § 94.
[479] *Cod. Theod.* 1, 4, 3.
[480] It is translated into English by Muirhead, *Roman law*[2], p. 363.
[481] The notes of Paulus and Ulpian on Papinian were expressly excepted: *Cod. Theod.* 1, 4, 3 and 1, 4, 1.
[482] See supra § 59.
[483] See supra § 53.

During the 200 years from Constantine the Great to Justinian, attempts were made to codify Roman law, — but with little success. The first step toward codification by Imperial legislation was naturally to revise and condense the statutes (constitutiones) of the Emperors, which were now after several centuries of Empire very numerous. The ante-Justinian official Roman codes of statutes[484] are illustrations of this line of work. All endeavors to codify Roman law made by Emperors prior to Justinian did much to pave the way for the accomplishment of this mammoth task by Justinian himself. In his reign the final step to the goal of true and complete codification was taken: a successful compilation of the writings of the Roman jurists, — the Digest of Justinian.

The ante-Justinian codes and collections are of three sorts: official Roman codes of statutes,[485] private unofficial Roman collections of jurisprudence, and Teutonic codes or Leges Romanae Barbarorum.

A. OFFICIAL ROMAN CODES OF STATUTES

The 3d century Gregorian Code. A certain jurist by the § 125
name of Gregorius compiled, perhaps **about A.D. 295,** a collection of Imperial statutes (constitutiones) from Hadrian to Diocletian.[486] Mommsen thinks[487] that Gregorius was then a professor in the law school of Berytus (modern Beirut). Only a few fragments of the Gregorian Code are extant,—these are found chiefly in the ante-Justinian private unofficial Roman collections of jurisprudence[488] and some of the Leges Barbarorum.[489] For instance in the Roman law of the Burgundians[490] is this reference: "A freeman is required to

[484] The nearest approach to a real codification was the ante-Justinian Code of Theodosius II, which was part of a plan to form a general code to supersede *all* existing law. See infra § 127.

[485] See infra §§ 125 et seq.

[486] A.D. 117–284.

[487] *Z. d. Sav. Stift.*, xxii, pp. 139 et seq.

[488] The *Consultatio, Collatio,* and *Vatican Fragments*: see infra §§ 129–30, 132.

[489] The *Breviarium* of Alaric, and *Lex Romana Burgundiorum.* See infra § 133.

[490] 44, 4.